86-104

Supreme Court, U.S.
FILED
JUL 21 1986
JOSEPH F. SPANIOL, JR.
CLERK

No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1985

THE BOARD OF AIRPORT COMMISSIONERS
OF THE CITY OF LOS ANGELES, et al.,
Petitioners,

VS.

JEWS FOR JESUS, INC., AND ALAN HOWARD SNYDER,
a.k.a. AVI SNYDER,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JAMES K. HAHN, City Attorney
JAMES H. PEARSON, Senior
Assistant City Attorney
JAMES R. KAPEL,*
Assistant City Attorney
#1 World Way
Los Angeles, CA 90009
(213) 646-3260
Attorneys for Petitioners
**Counsel of Record*

Bowne of Los Angeles, Inc., Law Printers (213) 742-6600

75pp

QUESTIONS PRESENTED FOR REVIEW

1. May an airport operator constitutionally limit the uses of the interiors of its terminal facilities to their dedicated and intended airport-related purposes or are those facilities public forums that require the airport operator to permit their use for non-airport related activities?

2. If the interiors of the terminal facilities at Los Angeles International Airport are not public forums, is the Board of Airport Commissioners' policy that limits the uses of those facilities to airport-related purposes a reasonable exercise of its right to reserve the uses of the terminal facilities to their dedicated and intended airport-related purposes?

LIST OF ALL PARTIES

Petitioner Board of Airport Commissioners of the City of Los Angeles ("Board") is charged by the Los Angeles City Charter with the management and control of the Los Angeles Department of Airports and the Los Angeles International Airport; Petitioner Johnnie L. Cochran, Jr. was the President of the Board and presently is a member of the Board; Petitioners Robert A. Chick, Maria D. Hummer and Samuel Greenberg were and presently are members of the Board; D.A. "Curt" Curtiss was a member of the Board at the time the initial action was brought but has since resigned the position and was replaced by Petitioner Jerry B. Epstein. Petitioner City of Los Angeles is a municipal corporation and the owner of the real property and facilities that comprise Los Angeles International Airport.

Respondent Jews for Jesus, Inc., is a California nonprofit religious corporation; Respondent Alan Howard Snyder, a.k.a. Avi Snyder, is a member and minister of the Jews for Jesus organization.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
LIST OF ALL PARTIES	ii
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL, STATUTORY, ETC., PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	5
THE INTERIORS OF AIRPORT TERMINAL FACILITIES ARE NOT TRADITIONAL PUBLIC FORUMS AND THE FACILITIES AT AIRPORTS HAVE NOT BEEN OPENED AS PUBLIC FORUMS	7
PETITIONERS HAVE NOT OPENED THEIR FACILITIES AT AIRPORT AS PUBLIC FORUMS BUT RATHER HAVE LIMITED THOSE FACILITIES TO THEIR INTENDED PURPOSES	11
CONCLUSION	16

Index to Appendices

Appendix A. Opinion of the United States Court of Appeals for the Ninth Circuit	A-1
Appendix B. Memorandum Decision and Judgment of the United States District Court	B-1
Appendix 1. Stipulation of Facts	1
Appendix 2. Resolution No. 13787	(1)
Appendix C. Los Angeles Board of Airport Commissioners Resolution No. 13787	C-1

TABLE OF AUTHORITIES

Cases

Page

City Council v. Taxpayers for Vincent, 466 U.S. 789, 80 L.Ed.2d 772, 104 S.Ct. 2118 (1984) 8, 13, 15

Cornelius v. N.A.A.C.P., 53 U.S.L.W. 5116, 473 U.S. ____, 87 L.Ed.2d 567, 105 S.Ct. 3439 (1985) 8, 11, 15

Fernandez v. Limmer, 663 F.2d 619 (5th Cir. 1981) 14, 15

Greer v. Spock, 424 U.S. 828, 47 L.Ed.2d 505, 96 S.Ct. 1211 (1976) 9

Hague v. C.I.O., 307 U.S. 496, 83 L.Ed. 1423, 59 S.Ct. 954 (1939) 8

Heffron v. International Society for Krishna Consciousness, 454 U.S. 640, 69 L.Ed.2d 289, 101 S.Ct. 2559 (1981) 6

ISKCON v. Barber, 650 F.2d 430 (2d Cir. 1981) ... 14

ISKCON v. Eaves, 601 F.2d 809 (5th Cir. 1979) ... 14

ISKCON v. Engelhardt, 425 F.Supp. 176 (D.C. Wis. 1977) 14, 15

ISKCON v. Rockford, 585 F.2d 263 (7th Cir. 1978) 14

ISKCON v. Wolke, 453 F.Supp. 869 (D.C. Wis. 1978) 14

Kuszynski v. Oakland, 479 F.2d 1130 (1973) 14, 15

Minnesota Bd. for Community Colleges v. Knight, 465 U.S. 271, 79 L.Ed.2d 299, 104 S.Ct. 1058 (1984) 11

Perry Ed. Assn. v. Perry Local Ed. Assn., 460 U.S. 37, 74 L.Ed.2d 794, 103 S.Ct. 948 (1983) 7, 12, 15

Rosen v. Port of Portland, 641 F.2d 1243 (1981) ... 14

U.S. v. Albertini, 53 U.S.L.W. 4844, 472 U.S. ____, 86 L.Ed.2d 536, 105 S.Ct. 2897 (1985) 9, 15

TABLE OF AUTHORITIES

CASES

Page

U.S. v. Grace, 461 U.S. 171, 75 L.Ed.2d 736, 103 S.Ct. 1702 (1983) 8

U.S. Postal Service v. Greenburgh Civic Assn., 453 U.S. 114, 69 L.Ed.2d 517, 101 S.Ct. 2676 (1981) 8, 12, 14

U.S.S.W. Africa/Namibia Trade and Cultural Council v. U.S., 708 F.2d 760 (D.C. Cir. 1983) 15

Constitution

United States Constitution, First Amendment 2, 6, 12, 14, 15

Statutes

United States Code, Title 28, Sec. 1254(1) 2

United States Code, Title 28, Sec. 1331 2

United States Code, Title 28, Sec. 1343(3) 2

United States Code, Title 42, Sec. 1983 ..... 2, 3

No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1985

THE BOARD OF AIRPORT COMMISSIONERS OF THE CITY OF LOS ANGELES, et al.,
Petitioners,

VS.

JEWS FOR JESUS, INC.,
and ALAN HOWARD SNYDER,
a.k.a. Avi Snyder,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Board of Airport Commissioners of the City of Los Angeles, et al., petition for Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit, in this case.

OPINIONS BELOW

The Opinion of the Court of Appeals (App. A) is reported in 785 F.2d 791 (9th Cir. 1986).

The Memorandum Decision and Judgment of the District Court (App. B) was not reported.

JURISDICTION

The Judgment of the Court of Appeals was entered on March 25, 1986. An extension of time within which to file a Petition for Writ of Certiorari to and including July 23, 1986, was granted by the Honorable William H. Rehnquist. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

The jurisdiction of this case in the District Court was based upon 28 U.S.C. §§ 1331, 1343(3).

CONSTITUTIONAL, STATUTORY, ETC., PROVISIONS INVOLVED

(1) The First Amendment to the United States Constitution provides:

> "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

(2) Title 42 U.S.C. § 1983 provides:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of

Columbia. R.S. § 1979; Pub.L. 96-170, § 1, Dec. 29, 1979, 83 Stat. 1284."

(3) The Los Angeles Board of Airport Commissioners Resolution No. 13787 that is the subject matter of this litigation is set forth in Appendix C.

STATEMENT OF THE CASE

This case involves the constitutionality of Petitioner's Board of Airport Commissioners' Resolution that can be summarized as follows:

> "The Los Angeles International Airport shall be limited to airport-related uses only except that the sidewalk areas immediately outside of the terminal facilities may be used for activities protected by the First Amendment."

The Petitioners consistently have limited the uses of the interiors of the terminal facilities at Los Angeles International Airport ("Airport") to their intended airport-related purposes and consistently have discouraged and prohibited any uses other than those intended to aid the traveling public.

The facts in this case are not in dispute. Airport is owned by the City of Los Angeles and operated by the Department of Airports ("Department"), which is under the management and control of the Petitioner Board of Airport Commissioners. The duties and obligations of the Petitioners are set forth in the Los Angeles City Charter, which requires the Petitioners to operate all of their airport properties for the promotion and accommodation of air commerce and air navigation or uses incidental thereto. Accordingly, unless the Petitioners make a determination that a portion of Airport is not required for airport purposes, the Petitioners are required by their

Charter to devote airport property exclusively to those activities that aid the traveling public.

Respondent Jews for Jesus is a non-profit religious organization and Respondent Alan Snyder is a minister for that organization. Respondents wished to advance their religious cause by distributing religious pamphlets in the interiors of the terminal facilities at Airport. Respondents were informed of the Petitioners' policy restricting the uses of interiors of the terminal facilities to airport-related purposes only and were told to stop conducting their religious activities within the terminals. After Respondents were prevented from pamphleteering within the terminal facilities (but not on the sidewalks outside), they filed the present action to enjoin enforcement of Petitioners' Policy.

Respondents claimed that:

(1) The interiors of the terminal facilities at Airport were public forums (either traditional public forums or opened as forums) and, thus, their non-airport related activities could not be excluded from the interiors of the terminal facilities at Airport;

(2) Their activities were not incompatible with the operations of Airport and, therefore, must be permitted; and

(3) Petitioners' policy was vague and overbroad.

Respondents were not and have not been prevented from using the interiors of the airport terminal facilities at Airport for their own travel-related purposes. Rather, Respondents were deterred from using those facilities for their non-airport related, religiously related purposes. Likewise, Respondents were not prevented from using the sidewalk areas outside the terminal facilities at Airport for their religious distribution efforts. Further, there is absolutely no indication or allegation that Respondents

were singled out because of their particular message. Rather, Respondents are just one of the many charitable groups, religious organizations and commercial enterprises that have been denied use of the interiors of the airport terminal facilities at Airport because those activities would neither advance air navigation nor directly aid the traveling public.

The District Court for the Central District of California, on stipulated facts (a copy of which is attached to its Opinion in App. B.), treated the parties' trial briefs as cross motions for summary judgment and in an unpublished memorandum decision (App. B) declared the Petitioners' policy unconstitutional and enjoined its enforcement. In so deciding, the District Court determined that the interiors of the airport terminal facilities at Airport were public forums (probably traditional public forums).

The Ninth Circuit, in its Opinion (App. A), affirmed the judgment of the District Court and held that the terminal facilities at Airport were traditional public forums and, accordingly, could not be limited to their intended and dedicated airport-related purposes even though such a limitation is an entirely reasonable way to operate a government-owned facility dedicated solely to airport-related purposes.

REASONS FOR GRANTING THE WRIT

This Writ should be granted because this case involves important constitutional issues that continue to be clouded and ignored by lower courts regardless of a series of current decisions from this Court regarding the use of publicly-owned facilities. These issues involve the uses of a government facility as a public forum when, in fact, the facility is intended, dedicated, and used for entirely different, but essential, functions. These issues

involve the right of the government to construct and operate a facility dedicated to and intended for specific uses and to reasonably disallow all other unrelated uses including those protected by the First Amendment. The Ninth Circuit's Opinion concluded that the interiors of all airport terminal facilities are identical to the streets and parks that have been held in trust for assembly and debate. If the Ninth Circuit's decision is permitted to stand, its reasoning could be applied not only to all airport facilities but to a host of other government buildings that are designed and dedicated for purposes that are not related to or intended for First Amendment activities. The important constitutional questions recognized by this Court in *Heffron v. International Society for Krishna Consciousness,* 454 U.S. 640, 646, 69 L.Ed.2d 289, 101 S. Ct. 2559 (1981) and a series of other decisions of this Court regarding the use of public property for purposes for which they were not intended are present in this case.

Furthermore, it is submitted that these constitutional issues are of paramount importance and need to be authoritatively decided by this Court to clarify a confused area of the law that has developed over the years. Lower court opinions often rely on "earlier" Courts of Appeal decisions that neither are accurate statements of the law nor valid precedent on the public forum issues.

The decisions of the District and Circuit Courts regarding the uses of public buildings for uses other than their intended and dedicated uses are a confused hodge-podge of conflicting legal theories hopelessly at variance with the principles of decisions of this Court. These lower court decisions frequently rely on out-dated and oftentimes incorrect lines of case authority to reach conclusions that clearly conflict with current Supreme Court decisions. Furthermore, these lower court opinions re-

garding the uses of publicly owned facilities often rely on each other compounding the initial errors and creating an apparently impressive line of authority that, when examined closely, falls like a house of cards. This problem runs throughout the lower court decisions regarding the uses of a variety of government facilities but is most apparent in the decisions dealing with the lawful uses of airport terminal facilities.

The present case is a dramatic example of a court's disregard of the essential holdings of this Court and, instead, a reliance on inappropriate, discredited, or inapplicable lower court case law to find that all airport terminal facilities, regardless of their intended and dedicated purposes and their past uses, are essentially parks devoted to assembly and debate. Such a conclusion can only be the result of a total disregard of the holdings of relevant decisions by this Court regarding the right of a government to limit the uses of its facilities to their dedicated and intended purposes and to disallow any other uses of those facilities whether those unrelated uses are protected or not. The fact that a Circuit Court could reach such a conclusion is a prime example of the need for an authoritative decision by this Court with regard to the public forum doctrine as it applies to the interiors of government facilities.

THE INTERIORS OF AIRPORT TERMINAL FACILITIES ARE NOT TRADITIONAL PUBLIC FORUMS AND THE FACILITIES AT AIRPORTS HAVE NOT BEEN OPENED AS PUBLIC FORUMS

Traditional public forums are those places that by long tradition or by government fiat have been devoted to assembly and debate. *Perry Ed. Assn. v. Perry Local Ed. Assn.*, 460 U.S. 37, 45, 74 L.Ed.2d 794, 103 S.Ct. 948 (1983). Traditional public forums "have immemorially been held in trust for use by the public and . . . have been

used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Hague v. C.I.O.*, 307 U.S. 496, 515, 83 L.Ed. 1423, 59 S.Ct. 954 (1939). Streets, parks and sidewalks are prime examples of traditional public forums. *U.S. v. Grace*, 461 U.S. 171, 179, 75 L.Ed.2d 736, 743, 103 S.Ct. 1702 (1983). A principle purpose of a traditional public forum is the free exchange of ideas. *Cornelius v. N.A.A.C.P.*, 53 U.S.L.W. 5116, 5119, 473 U.S. ____, ____, 87 L.Ed.2d 567, 580, 105 S.Ct. 3439 (1985).

The Ninth Circuit erroneously concluded that the interiors of the terminal facilities at Airport are traditional public forums. This decision was based on a superficial analysis of current case law and reliance on inappropriate, inapplicable or out-dated lower court case law. Both Respondents and the Ninth Circuit failed "to demonstrate the existence of a traditional right of access respecting . . . [interiors of airport terminal facilities] for purposes of their communication comparable to that recognized for streets and parks . . ." *City Council v. Taxpayers for Vincent*, 466 U.S. 789, 814, 80 L.Ed.2d 772, 104 S.Ct. 2118 (1984). Without such a demonstration of a *traditional right of access for communicative purposes*, it is clearly improper to conclude that the terminal facilities at Airport are so comparable to streets, parks and sidewalks that they are traditional public forums.

There is no question that publicly owned property does not become a public forum simply because it is owned or controlled by the government. *U.S. Postal Service v. Greenburgh Civic Assn.*, 453 U.S. 114, 129, 69 L.Ed.2d 517, 101 S.Ct. 2676 (1981). Furthermore, the fact "that government property can be used as a vehicle for communication does not mean that the Constitution requires such uses to be permitted." *City Council v. Taxpayers for Vincent, supra*, at 814. Likewise, the fact that the public is freely

admitted to the property does not make a facility a public forum. *Greer v. Spock*, 424 U.S. 828, 830, 838, and n. 10, 47 L.Ed.2d 505, 96 S.Ct. 1211 (1976). *U.S. v. Albertini*, 53 U.S.L.W. 4844, 4847, 472 U.S. ____, ____, 86 L.Ed.2d 536, 546, 105 S.Ct. 2897 (1985).

Regardless of these clear principles, the Ninth Circuit chose to ignore them and to rely on older cases that considered public ownership, public admission, and the fact that the terminal facilities at Airport could be used for communicative purposes as determinative factors in deciding whether a public forum at Airport existed. There can be no doubt that a number of "airport cases" have concluded that certain protected activities could not be restricted by the particular "time, place and manner" restriction adopted by a particular airport authority. It is submitted, however, that these "airport cases" neither support the Ninth Circuit's decision nor, because of their particular facts, lend any support to the erroneous conclusion that the terminal facilities at Airport are traditional public forums or any type of public forum.

The interiors of airport terminal facilities are not held in trust to be used by the public for assembly and debate. Rather, they are intended, designed and dedicated to their airport-related purposes. The mere fact that some airport operators have opened their facilities to non-airport related activities does not mean, as the Ninth Circuit would have us believe, that all airport terminal facilities, regardless of their intended, dedicated and actual uses and regardless of their operator's intent, are either traditional public forums or any other kind of public forum.

Airport terminal facilities do not have as their principle purpose the free exchange of ideas. Airport terminal facilities have as their principle purpose the promotion of air transportation and aid to the traveling public. For the

Airport involved in this litigation, its exclusive purpose is the promotion of air navigation and aid to the traveling public. The Charter mandates that the Airport's facilities be used only for its intended and dedicated airport-related purposes and the Petitioners have followed this Charter obligation.

The Ninth Circuit's opinion in this case has created a new category of traditional public forum called "airport terminal buildings". According to the Ninth Circuit Court of Appeals, traditional public forums are no longer just those streets, parks and sidewalks held in trust for the public's use for assembly and debate. The Ninth Circuit Court of Appeals must have concluded that airport terminal facilities have a long tradition of access for communicative purposes that has been present for "time out of mind" in the streets and parks. The Ninth Circuit Court of Appeals' conclusion is ludicrous and flies in the face of the conclusions reached by this Court about the lawful uses of government-owned facilities.

Airports generally by their very nature are dedicated and intended to be used for airport-related purposes. Certainly an airport operator or any governmental entity operating a non-traditional forum facility may "open" its facility and use it, in part, as a public forum. Without such an intentional opening, however, a public facility dedicated to a non-communicative purpose and used only for that purpose is not a public forum, let alone a traditional public forum.

This Court has repeatedly stated that:

> "It is a fundamental principle of First Amendment doctrine, articulated most recently in *Perry Education, Assn. v. Perry Local Educators' Assn.* 460 U.S. ——, —— — ——, 74 L.Ed. 2d 974, 103 S. Ct. 948 (1983), that for government property to be a public

> forum, it must by long tradition or by government designation be open to the public at large for assembly and speech." *Minnesota Bd. for Community Colleges v. Knight,* 465 U.S. 271, 280, 79 L.Ed.2d 299, 309, 104 S. Ct. 1058 (1984).

It necessarily follows, that without that long tradition of use for communicative purposes, a government-owned facility cannot instantly become a traditional public forum.

It is submitted that the intended airport-related uses of the interiors of the airport terminal facilities at Airport are not comparable in any way to the intended communicative purposes of streets and parks so as to make the interiors of the terminal facilities at Airport traditional public forums.

PETITIONERS HAVE NOT OPENED THEIR FACILITIES AT AIRPORT AS PUBLIC FORUMS BUT RATHER HAVE LIMITED THOSE FACILITIES TO THEIR INTENDED PURPOSES

This Court has explained that: "[t]he government does not create a public forum by inaction or by permitting limited discourse but *only by intentionally opening* a nontraditional public forum for public discourse." *Cornelius v. N.A.A.C.P., supra,* at p. 5120, L.Ed.2d at p. 580. (Emphasis added.) Furthermore, this Court in *Cornelius* stated that "[w]e will not find a public forum has been created in the face of clear evidence of a contrary intent . . . ." *Cornelius v. N.A.A.C.P., supra,* at p. 5120, L.Ed.2d at p. 580.

Petitioners in this case neither intentionally nor unintentionally opened the interiors of its terminal facilities at Airport for public discourse. Petitioners' intent is clear from its long-standing policy reaffirmed by its Resolution 13787. Petitioners' intent is also clear from the actual

uses of its terminal facilities at Airport. Petitioners are required to limit and have limited the uses of the terminal facilities at Airport to their dedicated and intended airport-related purposes. If a proposed use does not directly aid the traveling public, it has been disallowed.

There can be no doubt that "... where government property is not dedicated to open communication the government may — without further justification — restrict use to those who participate in the forum's official business." *Perry Ed. Assn. v. Perry Local Ed. Assn., supra,* at p. 53 (fn. omitted). Petitioners have consistently operated within this court's guidelines. Regardless of this clear right, the Ninth Circuit has disregarded the government's right to use its property for its intended and dedicated purposes and has declared that all airports, no matter how they have been dedicated or used, are public forums. No longer can any airport operator reserve its terminal facilities to their intended and dedicated purposes. Rather, the Ninth Circuit now compels every airport operator to open its facilities as public forums restricted only by time, place and manner regulations narrowly drawn and justified only by a showing of a compelling governmental interest. This ruling that airport terminal facilities must be made available for First Amendment activities, regardless of the legal mandates of the airport operator, is clearly contrary to this Court's conclusion that:

> "In addition to time, place and manner regulations, the state may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not merely an effort to suppress expression merely because public officials oppose the speaker's view." *United States Postal Service v. Greenburgh, supra,* at p. 131; *Perry Ed. Assn. v. Perry Local Ed. Assn., supra,* at p. 46.

See also *City Council v. Taxpayers for Vincent, supra,* at p. 814 and fn 31.

The Ninth Circuit's Opinion and the District Court's Opinion are both erroneous and superficial applications of the substantive law relating to the public forum, non-forum analysis. The opinions are replete with misstatements of the current law and reliance on inapplicable or inappropriate case law. If these decisions are permitted to remain uncorrected, they will breath new life into misconceptions that this Court has attempted to rectify by the series of its recent decisions dealing with the uses to which public facilities may be put.

The Ninth Circuit stated in this case that:

> "Since *Rosen* and *Kuszynski,* the law of this circuit has been that an airport complex is a traditional public forum. Every circuit which has confronted the issue has reached the same conclusion."

An examination of the "airport cases" establishes clearly that his conclusion is incorrect. The fact that the Ninth Circuit was able to reach such a conclusion from those cases is a prime example of the compelling need for an authoritative decision by this Court with regard to how the public forum analysis applies to the interiors of government-owned airport terminals as well as other government-operated facilities. Even if the Ninth Circuit were correct in concluding that the various circuit courts have determined that the interiors of airport terminal facilities are, without more, public forums, then such decisions are in direct conflict with the fundamental principles explained by this Court.

In reaching the above conclusion, the Ninth Circuit relied on circuit court cases that did not examine the issue of whether a government facility was, by that fact alone, a public forum but, rather, examined "time, place

and manner" restrictions for airports that had opened their facilities to expressive activities. The present case does not involve the review of such a restriction but, rather, involves the obvious right of an airport operator to limit its facilities to their intended and dedicated purposes. A time, place, and manner restriction of permissible expressive activities is governed by a different standard than that used to govern a reservation of government facilities for their intended purposes. *U.S. Postal Service v. Greenburgh Civic Assns.* 453 U.S. 114, 132, 69 L.Ed.2d 517, 101 S. Ct. 2676 (1981). The Ninth Circuit obviously failed to recognize this important difference and chose to rely on its own earlier opinion in *Kuszynski v. Oakland,* 479 F.2d 1130 (1973).

Both the District Court and the Circuit Court seem to conclude that the two-page *Kuszynski* opinion requires a finding that the interiors of *all* airport terminals are public forums. Such a conclusion is clearly improper because *Kuszynski* involved the review of a time, place and manner restriction that, of course, is governed by a very different standard than is a decision to limit the uses of a government facility to its intended purposes. Regardless of this, however, the Ninth Circuit has concluded erroneously that these cases, and others involving an intentional opening of an airport facility or a review of a time, place and manner restriction,[1] require a finding that all airports are public forums.

---

[1]A summary examination of other airport cases dealing with First Amendment issues reveals that they are of little or no precedential value in deciding whether Airport is a public forum. *Rosen v. Port of Portland,* 641 F.2d 1243 (1981); *Fernandez v. Limmer,* 663 F.2d 619 (5th Cir. 1981); *ISKCON v. Eaves,* 601 F.2d 809 (5th Cir. 1979); *ISKCON v. Rochford,* 585 F.2d 263 (7th Cir. 1978), and *ISKCON v. Barber,* 650 F.2d 430 (2d Cir. 1981) involve the review of time, place and manner restrictions. *ISKCON v. Wolke,* 453 F. Supp. 869, 874 (D.C. Wis. 1978); *ISKCON v. Engelhardt,* 425 F. Supp. 176, 180

More importantly, both the District Court and the Ninth Circuit (as well as other courts deciding airport cases) cite *Kuszynski, supra,* at p. 113, for the proposition that: "[s]ince the airport is public property . . . free speech may be abridged only by regulations narrowly drawn to serve legitimate of the general public who use the airport" (App. A, p. A-9, App. B, p. B-5). *Kuszynski* has been repeatedly cited by various courts for that incorrect proposition. See, e.g., *Fernandez v. Limmer,* 663 F.2d 619, 626-627 (5th Cir., 1981). Such a conclusion is clearly incorrect. *City Council v. Taxpayers for Vincent, supra,* at p. 814 and fn. 31. *Cornelius v. N.A.A.C.P., supra,* at p. 5120, L.Ed.2d at p. 579-580.

The Ninth Circuit has now compounded its earlier mistake and has concluded essentially that, regardless of this Court's clearly stated First Amendment principles to the contrary, public ownership in and of itself creates a public forum. If this decision is permitted to stand, it will confuse and contradict the very clear positions taken by this Court in its recent decisions in *Cornelius v. N.A.A.C.P., U.S. v. Albertini,* and *Perry Ed. Assn. v. Perry Local Ed. Assn.,* among others, regarding the lawful uses of public facilities.

Petitioners in this case have exhibited a sensitivity to the First Amendment. They did not ban all First Amendment activities from the sidewalk areas of the Airport. In fact, Petitioners have specifically allowed First Amendment activities to be conducted on the sidewalk areas. Petitioners have also exhibited a concern that the facilities they control be used for their intended purposes and their intended purposes only. Such a determination is entirely reasonable and a proper exercise of their ability

---

(D.C. Wis. 1977); and *U.S.S.W. Africa/Namibia Trade and Cultural Council v. U.S.,* 708 F.2d 760 (D.C. Cir. 1983), dealt with places that were "opened" for expressive purposes.

to decide whether Airport property should be used for airport-related purposes or should be Hyde Parks dedicated to communicative purposes. If the courts are able to take away the ability of a government to limit its facilities to their intended purposes, all government-operated facilities, regardless of their intended purposes or dedication, may become mini-parks dedicated to the widest range of activities imaginable.

Because of the confusion in the lower courts regarding the propriety of the reservation of a government facility for its intended and dedicated purposes, Petitioners request that this Court resolve the significant and critical issues presented herein.

CONCLUSION

For the reasons set forth above, Petitioners respectfully request that this Writ of Certiorari be granted by this Court.

Respectfully submitted,

JAMES K. HAHN, City Attorney
JAMES H. PEARSON, Senior Assistant City Attorney
JAMES R. KAPEL, Assistant City Attorney
#1 World Way
Los Angeles, CA 90009
(213) 646-3260

By JAMES R. KAPEL
Attorneys for Petitioners

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JEWS FOR JESUS, a California non-profit religious corporation and ALAN HOWARD SNYDER a.k.a. AVI SNYDER, an individual,
Plaintiffs/Counter-defendants/Appellees,

vs.

THE BOARD OF AIRPORT COMMISSIONERS OF THE CITY OF LOS ANGELES; et al.,
Defendants/Counter-claimants/Appellants.

Appeal from the United States District Court
for the Central District of California
Edward Rafeedie, District Judge, Presiding.

Argued and submitted January 17, 1986
San Francisco, California

No. 85-5808

D.C. No. CV 84-5268-ER

OPINION

Before: SNEED, ANDERSON, and ALARCON, Circuit Judges.
ALARCON, Circuit Judge.

Filed: March 25, 1986

Cathy A. Catterson, Clerk
U.S. Court of Appeals

Appellants Board of Airport Commissioners and City of Los Angeles appeal the district court's summary judg-

ment in favor of appellees Jews for Jesus, Inc. and Alan Snyder. The district court found that: (1) the Central Terminal Area at Los Angeles International Airport (the interiors of the eight passenger terminals) is a traditional public forum; and (2) Resolution 13787 which prohibits all First Amendment activities within the Central Terminal Area is unconstitutional on its face. The Board appeals primarily because it disagrees with the district court's finding that the Central Terminal Area is a public forum. We affirm.

I.

BACKGROUND

Plaintiffs and appellees (hereinafter Jews for Jesus) are Jews for Jesus, Inc., a non-profit religious corporation, and Alan Howard Snyder, a minister of the Gospel for Jews for Jesus. The defendants and appellants (hereinafter the Board) are the City of Los Angeles and the Board of Airport Commissioners of the City of Los Angeles, as individuals and as operator of Los Angeles International Airport (hereinafter LAX). The Board, pursuant to City of Los Angeles Charter § 238.4, manages and controls all airports owned by the City of Los Angeles including LAX.

On July 13, 1983, the Board adopted Resolution No. 13787 (hereinafter the Resolution) which states in part:

> NOW, THEREFORE BE IT RESOLVED by the Board of Airport Commissioners that the Central Terminal Area at Los Angeles International Airport is not open for First Amendment activities by any individual and/or entity;
>
> • • • •

> BE IT FURTHER RESOLVED that if any individual or entity engages in First Amendment activities within the Central Terminal Area at Los Angeles International Airport, the City Attorney of the City of Los Angeles is directed to institute appropriate litigation against such individual and/or entity to ensure compliance with this Policy statement of the Board of Airport Commissioners . . . .

On July 6, 1984, Snyder was distributing free religious literature on a pedestrian walkway in the Central Terminal Area (hereinafter CTA) at LAX when he was approached by a uniformed Department of Airports peace officer. The officer showed Snyder a copy of the Resolution, explained that Snyder was violating the Resolution, and asked Snyder to leave. The officer warned Snyder that if he refused to leave the City would take legal action against him. Snyder stopped distributing the leaflets and immediately left the airport terminal.

On July 17, 1984, Jews for Jesus filed suit in district court seeking a declaration of their rights to distribute religious literature in public areas in the CTA. Jews for Jesus challenged the constitutionality of the Resolution under both the Federal and California Constitutions on three grounds: (1) that it is unconstitutional on its face because it totally bans First Amendment activities in a public forum; (2) that the Resolution is unconstitutional as applied to plaintiffs because it has only been used to ban certain kinds of communicative conduct such as leafletting by Jews for Jesus; and (3) that it is unconstitutionally vague and overbroad because the term "First Amendment activities" does not give guidance to officials or the public as to what activity is prohibited.

The matter came before the district court for trial on January 6, 1985. Counsel for all parties orally stipulated to the facts and the district court treated the trial briefs

as cross-motions for summary judgment without objection from the parties. The district court ruled that the CTA is a traditional public forum, declared the total ban on First Amendment activities unconstitutional on its face, and declined to reach the other issues raised by Jews for Jesus.

II.

STANDARD OF REVIEW

Because the parties stipulated to the facts below, there are no factual issues on appeal. This court reviews *de novo* the district court's application of the law to the facts on free speech questions. *Carreras v. City of Anaheim,* 768 F.2d 1039, 1042 n.2 (9th Cir. 1985).

III.

DISCUSSION

The United States Supreme Court recently enunciated the proper analysis for a First Amendment issue. First, the court must decide whether the challenged activity or speech is protected by the First Amendment, for, if it is not, the court need go no further. *Cornelius v. NAACP Legal Defense & Educational Fund, Inc.,* 105 S. Ct. 3439, 3446 (1985). If the speech is protected, the court must identify the nature of the forum, because the extent to which the government may limit access depends on whether the forum is public or nonpublic. *Cornelius,* 105 S. Ct. at 3446-47. Finally, the court must assess whether the justifications for exclusion from the relevant forum satisfy the requisite standard. *Cornelius,* 105 S. Ct. at 3447.

The Board does not dispute that distribution of literature is a form of communication protected by the First

Amendment. *United States v. Grace,* 461 U.S. 171, 176 (1983); *Lovell v. Griffin,* 303 U.S. 444 (1938); *Rosen v. Port of Portland,* 641 F.2d 1243, 1245 (9th Cir. 1981). Both parties agree that the determinative legal issue in this case is whether the CTA is a public forum. That determination will provide the standard we must apply when reviewing the constitutionality of the Resolution.

Jews for Jesus argue that the central terminal areas in airports are traditional public forums open to free expression. The Board asserts that a traditional public forum analysis is inapplicable because the CTA at LAX is a nonpublic area which has not been opened to First Amendment expression by the Board. The Board contends that it has operated the terminal facilities solely for airport-related purposes and has neither created a forum for expressive purposes nor opened the area for the debate of issues of public interest unrelated to the airport's intended uses. The Board's reliance on recent Supreme Court decisions in *Perry Education Association v. Perry Local Educators' Association,* 460 U.S. 37 (1983), and *Cornelius,* 105 S. Ct. 3439 is misplaced. These cases do not concern the determination of traditional public forums. They address the separate and distinct issue whether governmental facilities that are *not* traditional public forums have been *opened* for First Amendment activities. *See Perry Education Association,* 460 U.S. at 46 (interschool mail system is not a traditional public forum); *Cornelius,* 105 S. Ct. at 3450 (the Combined Federal Public Campaign literature is not a traditional public forum).

The Supreme Court recently described traditional public forums as "those places which 'by long tradition or by government fiat have been devoted to assembly and debate.' " *Cornelius,* 105 S. Ct. at 3449, *quoting Perry Education Association,* 460 U.S. at 45. "Public streets and

parks fall into this category." *Cornelius,* 105 S. Ct. at 3449. A principal purpose of traditional public forums is the free exchange of ideas. *Cornelius,* 105 S. Ct. at 3448. "In such places, the government's ability to permissibly restrict expressive conduct is very limited: the government may enforce reasonable time, place, and manner regulations as long as the restrictions 'are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.' " *Grace,* 461 U.S. at 177, *quoting Perry Education Association,* 460 U.S. at 45. "Additional restrictions such as an absolute prohibition on a particular type of expression will be upheld only if narrowly drawn to accomplish a compelling governmental interest." *Grace,* 461 U.S. at 177.

This court, like a number of other circuits, has addressed the First Amendment forum issue in the context of airport terminals and concluded that airport terminal buildings are public forums open to First Amendment activity. In *Rosen v. Port of Portland,* 641 F.2d 1243 (9th Cir. 1981), the chairman of Jews for Jesus challenged an ordinance and implementing regulations enacted by the Port of Portland that required those persons seeking to "exercise . . . the fundamental constitutional right of free expression" at the Portland International Airport terminal to register in advance and identify their sponsor. *Id.* at 1245 & n.2. The district court upheld the ordinance and we reversed. We observed in *Rosen* that "[t]he first amendment is to be given full effect in the public areas of airport terminal buildings," *id.* at 1245, and held both the advance notice and the identification provisions of the ordinance unconstitutional. *Id.* at 1252.

In *Rosen* we relied on our earlier ruling in *Kuszynski v. City of Oakland,* 479 F.2d 1130 (9th Cir. 1973), and cited with approval a Seventh Circuit decision, *Chicago Area*

Military Project v. City of Chicago, 508 F.2d 921 (7th Cir.), *cert. denied,* 421 U.S. 992 (1975) (hereinafter *CAMP*). The ordinance challenged in *Kuszynski* provided that "[t]he use of the [Oakland] Airport for the purpose of exercising the right of free expression and communication . . . shall not be allowed to impair or interfere with the transportation function of the airport. The exercise of such rights shall be in accordance with [certain rules and regulations]." *Kuszynski,* 479 F.2d at 1130-31. Among other things, the regulations required the approval of the Oakland Airport manager before an exercise of First Amendment rights and limited leafletting to a period of four hours. In a brief opinion, we concluded: "Since the airport is public property . . . free speech may be abridged only by regulations narrowly drawn to serve legitimate interests of the general public who use the airport." *Kuszynski,* 479 F.2d at 1131. We found the ordinance invalid and ordered the district court to "enjoin the enforcement of those portions of the ordinance not found to be reasonably necessary for the management of the airport." *Id.*

The Seventh Circuit's decision in *CAMP,* 508 F.2d 921, contains an extensive analysis of the forum issue which we find persuasive. The court in *CAMP* rejected many of the same arguments now before this court and held that the publicly owned and operated O'Hare Airport could not flatly bar the distribution of leaflets in public areas inside the terminal buildings.

The City of Chicago in *CAMP* argued that it had not opened O'Hare to free speech activities. The City claimed "that the public receives a limited invitation to use O'Hare Airport for travel purposes only." *CAMP,* 508 F.2d at 925. The Seventh Circuit found that these contentions were neither "supported by the evidence" nor "realistic." *Id.* The court analogized the airport terminal to

traditional public forums and concluded the terminal was a public forum where First Amendment activity could not be totally banned.

> [T]he plaintiffs do not here claim any right to distribute leaflets on airplanes or in other privately owned or leased places but only in the spacious, city-owned common areas which resemble those public thoroughfares which have been long recognized to be particularly appropriate places for the exercise of constitutionally protected rights to communicate ideas and information.

Id., citing Hague v. CIO, 307 U.S. 496, 515-16 (1939).

More recent appellate decisions are in accord with the holdings in *Rosen, Kuszynski,* and *CAMP.* In *United States Southwest Africa/Nambia Trade & Cultural Council v. United States,* 708 F.2d 760 (D.C. Cir. 1983), the District of Columbia Circuit categorized the public areas of Washington National Airport (National) and Dulles International Airport (Dulles) as "public forums" for First Amendment purposes. *Id.* at 764. The District of Columbia Circuit quoted with approval the Seventh Circuit's analogy in *CAMP* of airport terminals to public thoroughfares. *Id.* The court also observed that "[w]hatever commonsense differences may exist in the forms of free speech allowable in airports, as opposed to parks and streets, an unusual consensus of judicial, legislative, and administrative opinion would classify the public areas of National and Dulles squarely within the public forum family." *United States Southwest Africa,* 708 F.2d at 766.

The Fifth Circuit similarly found the Dallas-Fort Worth Airport complex to be a public forum in *Fernandes v. Limmer,* 663 F.2d 619 (5th Cir. 1981). In response to Dallas-Fort Worth's claim that "the airport ought not be regarded as a public forum," the Fifth Circuit stated: "It

is now generally well established that airport terminals owned and administered by governmental entities are public forums in which efforts to regulate speech or religious activity must comport with First Amendment guarantees." *Id.* at 626. The *Fernandes* court concluded that "in view of the lack of restrictions on entry by the general public, and the commercial, street-like character of the terminal concourses . . . the [Dallas-Fort Worth] terminal buildings must be treated as public forums." *Id.* at 627. *See also Wolin v. Port of New York Authority,* 392 F.2d 83, 89 (2d Cir.) (the interior of the Bus Terminal operated by the New York Port Authority is traditionally a place for exercise of First Amendment rights), *cert. denied,* 393 U.S. 940 (1968).

Since *Rosen* and *Kuszynski,* the law of this circuit has been that an airport complex is a traditional public forum. Every circuit which has confronted the issue has reached the same conclusion. We hold that the Central Terminal Area at LAX is a traditional public forum.

Because the CTA is a traditional public forum, the Board's resolution banning all First Amendment activity can be upheld only if it was narrowly drawn to accomplish a compelling governmental interest. *Grace,* 461 U.S. at 177; *Cornelius,* 105 S. Ct. at 3448. The Board sets forth only one governmental interest to justify the total exclusion of First Amendment activity in the CTA: "The Los Angeles City Charter requires the Board to operate all of its properties for promotion and accommodation of air navigation and air commerce and uses incidental thereto." The Board has not shown that its desire to limit the uses of the terminal facilities to airport-related purposes is sufficiently compelling to justify the uniform and absolute prohibition on all First Amendment activity in the CTA. In fact, the parties stipulated that "[i]n distributing the religious literature [in the CTA], Snyder was

not blocking any entrance, exit, stairway, escalator, elevator, door, or otherwise inhibiting the free flow of pedestrian traffic [in the CTA]" and that "Snyder was not touching, annoying, blocking, obstructing, or otherwise harassing any other person present in the immediate vicinity of his location on the pedestrian walkway [in the CTA]." *See Fernandes,* 663 F.2d at 626 (that the passageways of the Dallas-Fort Worth Airport are crowded and narrow does not justify prohibiting Krishna followers from distributing literature and soliciting funds); *Wolin,* 392 F.2d at 91 (absolute prohibition of leafletting at the New York Port Authority's Bus Terminal cannot be defended on the ground that it would obstruct traffic).

The fact that the CTA is a traditional public forum does not preclude the Board from imposing restrictions on the distribution of leaflets. The Board is free to promulgate reasonable time, place, and manner restrictions on the distribution of literature in the CTA. *See Heffron v. International Society for Krishna Consciousness, Inc.,* 452 U.S. 640 (1981); *CAMP,* 508 F.2d at 926 (airport authorities may prohibit leafletting at check-in counters, arrival and departure gates, or any other areas where it is shown to substantially interfere with rapid and efficient airport operations). Because the 1983 resolution proscribes all First Amendment activity rather than setting forth reasonable time, place, and manner restrictions on such activity, it is unconstitutional on its face.

IV.

CONCLUSION

We hold that the distribution of literature by Jews for Jesus is protected speech and that the Central Terminal Area of the Los Angeles International Airport is a public forum. The governmental interests advanced by the Board are not sufficiently compelling to justify the total

exclusion of those persons wishing to exercise free speech within the CTA.

The Board has conceded that, in the event Jews for Jesus prevail in this litigation, they are entitled to recover their attorneys' fees pursuant to 42 U.S.C. § 1988. Since we have concluded that the Board's resolution is unconstitutional, Jews for Jesus are the prevailing parties and shall recover reasonable attorneys' fees as part of their costs. *See Hensley v. Eckerhart,* 461 U.S. 424 (1983); *Douglas v. City of Jeannette,* 319 U.S. 157, 162 (1943).

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JEWS FOR JESUS, INC., a California non-profit religious corporation and ALAN HOWARD SNYDER, a.k.a. AVI SNYDER,
Plaintiffs,

v.

THE BOARD OF AIRPORT COMMISSIONERS OF THE CITY OF LOS ANGELES; JOHNNIE L. COCHRAN, JR., President of the Los Angeles Board of Airport Commissioners; ROBERT A. CHICK, Vice-President of the Los Angeles Board of Airport Commissioners; and D. A. "CURT" CURTISS, MARIA D. HUMMER, AND SAMUEL GREENBERG, Members of the Los Angeles Board of Airport Commissioners, the last five in their official and individual capacities; CITY OF LOS ANGELES, a municipal corporation,
Defendants.

No. CV 84-5268-ER
MEMORANDUM DECISION AND JUDGMENT

Filed: March 26, 1985 — Clerk, U.S. District Court Central District of California

Entered: March 29, 1985 — Clerk U.S. District Court Central District of California

The above captioned matter came before this Court for trial without a jury on January 8, 1985. Prior to trial the Court indicated to counsel its desire to treat the trial

briefs as cross motions for summary judgment. None of the parties planned to call witnesses at trial and counsel for all defendants orally stipulated to the facts stated in plaintiffs' Exhibit #1 ("Stipulated Facts for Trial"). As there were no genuine issues of material fact to be decided at trial and without objection from the parties, the oral argument was held as argument on cross motions for summary judgment on the constitutionality of Board of Airport Commissioners of the City of Los Angeles Resolution No. 13787.*

FACTS

Defendant Board of Airport Commissioners of the City of Los Angeles ("Board of Airport Commissioners"), pursuant to City of Los Angeles Charter § 238.4, manages and controls all airports owned by the City of Los Angeles including Los Angeles International Airport ("LAX").

On July 13, 1983 at a special meeting the Board of Airport Commissioners adopted Resolution No. 13787 ("the Resolution") which states in part:

> NOW, THEREFORE BE IT RESOLVED by the Board of Airport Commissioners that the Central Terminal Area at Los Angeles International Airport is not open for First Amendment activities by any individual and/or entity;
>
> * * * *
>
> BE IT FURTHER RESOLVED that if any individual or entity engages in First Amendment activities within the Central Terminal Area at Los Angeles

---

*The stipulated Facts for Trial and the text of Resolution No. 13787 are attached hereto as Appendix 1 and Appendix 2, respectively.

> International Airport, the City Attorney of the City of Los Angeles is directed to institute appropriate litigation against such individual and/or entity to ensure compliance with this Policy statement of the Board of Airport Commissioners;

Plaintiffs challenge the constitutionality of the Resolution on three grounds: (1) that it is unconstitutional on its face because it totally bans First Amendment activity in a public forum; (2) that the Resolution is unconstitutional as applied to plaintiffs because it only has been used to ban certain kinds of communicative conduct such as leafletting by plaintiffs; and (3) that it is unconstitutionally vague and overbroad because the term "First Amendment activities" does not give guidance to officials or the public as to what activity is prohibited. Finding the Resolution unconstitutional on its face, this Court does not reach the second and third challenges to the Resolution.

Plaintiffs are Jews for Jesus, a non-profit religious corporation, and Alan Howard Snyder, a minister of the Gospel for Jews for Jesus. On Friday, July 6, 1984 Snyder was distributing free religious literature at LAX when he was approached by a uniformed Department of Airports peace officer who showed Snyder a copy of the Resolution, explained that Snyder was in violation thereof, and asked Snyder to leave. The officer warned Snyder that if he refused to leave the City would take legal action against him. Snyder stopped distributing the leaflets and immediately left the airport terminal.

CONSTITUTIONALITY OF THE RESOLUTION

The First Amendment stops government from passing laws abridging the freedom of speech and the right of the people peaceably to assemble. *U.S. Const.* Amend. I. At least since 1939 it has been clear the government cannot

ban First Amendment activity totally in traditionally public places. First Amendment activities in such places are, however, subject to valid time, place and manner restrictions. *See e.g. Heffron v. International Society for Krishna Consciousness,* 452 U.S. 640, 101 S.Ct. 2559, 69 L.Ed.2d 298 (1981). As the Supreme Court wrote in *Hague v. Committee for Industrial Organization,* 307 U.S. 496, 59 S.Ct. 954, 83 L.Ed. 1423 (1939):

> Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens. *The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all;* it is not absolute, but relative and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; *but it must not, in the guise of regulation, be abridged or denied.*

301 U.S. at 964, 59 S.Ct. at 515-16 (emphasis added).

The resolution being challenged by plaintiffs here completely bans First Amendment activity in the Central Terminal of LAX and therefore must be struck down if the Central Terminal is a public forum like the streets and parks discussed in *Hague.* The question then facing the Court is whether a municipally owned and operated airport terminal is a public forum. The question is easily answered. Numerous appellate opinions have held that airport terminals are public forums. *Kuszynski v. City of Oakland,* 479 F.2d 1131 (9th Cir. 1973) is the seminal case on the subject. The ordinance challenged and struck

down in *Kuszynski* provided that "The use of the Airport for the purpose of exercising free expression and communication . . . shall not be allowed to impair or interfere with the transportation function of the airport. The exercise of such rights shall be in accordance with [certain rules and regulations]." Among other things, the regulations required approval of the airport manager before an exercise of First Amendment rights and limited leafleting to four hours. In a brief opinion the court concluded, "Since the airport is public property . . . free speech may be abridged only by regulations narrowly drawn to serve legitimate interests of the general public who use the airport." *Id.* at 1131. The court found the ordinance invalid because there was no showing that the restrictions were reasonable. The court ordered the district court to "enjoin the enforcement of those portions of the ordinance not found to be reasonably necessary to airport management." *Id.*

This Court need go no further in analyzing the Board of Airport Commissioner's case. It is obvious from the one page opinion of the Ninth Circuit in *Kuszynski* that airports are public forums. While it belabors the obvious to address the question further, the Court will briefly discuss other precedents supportive of plaintiffs' argument.

In *Rosen v. Port of Portland,* 641 F.2d 1243 (9th Cir. 1981) the Ninth Circuit wrote: "The first amendment is to be given full effect in public areas of airport terminal buildings . . . . However, the regulation of activity that interferes with the normal use of an airport facility is a proper governmental function." *Id.* at 1245-46. In *Rosen* the appellate court reversed a district court and found the restrictions imposed by the Port of Portland were unconstitutional. "Both the advance notice and the identification provisions of the challenged ordinance violate the

United States Constitution . . . . persons desiring to exercise their free speech rights may not be required to give advance notice and to identify themselves and their sponsors to Port authorities." *Id.* at 1252. It is obvious that if Portland cannot require advance notice by and identification of leafleters, Los Angeles cannot ban them all together. LAX is a public forum and the challenged Resolution is unconstitutional. *Accord S.W. Africa/Namibia Trade & Cult. Coun. v. U.S.,* 708 F.2d 760 (D.C. Cir. 1983) (National and Dulles airports public forums); *Fernandes v. Limmer,* 663 F.2d 619 (5th Cir. 1981) (Dallas-Fort Worth Airport a public forum). In *Chicago Area Military Project v. City of Chicago,* 508 F.2d 921 (7th Cir. 1975) the City of Chicago claimed "that the public receives a limited invitation to use O'Hare Airport for travel purposes only" but the 7th Circuit found that argument was neither supported by the evidence nor . . . realistic" and held that O'Hare Airport is a public forum. 508 F.2d at 925. The City of Los Angeles makes the same claim as the City of Chicago did. It is no more persuasive in 1985 than it was in 1975.

When asked what makes LAX, the third busiest airport in the world, different from National, Dulles, Dallas-Fort Worth and O'Hare airports, defendants' counsel stated that those airports chose to be public forums by enacting time, place, and manner restrictions and LAX did not. This argument, while creative, is supported neither by fact nor law.

As a factual matter, the City has stipulated that "a variety of religious and/or political groups have utilized the interior area of terminals at LAX, including the pedestrian walkways located therein, to distribute literature, solicit funds, and communicate ideas." The City further stipulated that "the interior of terminal areas at LAX, including the pedestrian walkways located therein,

have been utilized on a number of occasions by print, television and radio media for the purpose of filming, photographing and/or interviewing public figures." The City also stipulated to other uses of LAX for non-travel related matters. *See* Appendix 1.

More importantly, the contention that an airport is not a public forum unless the City consents to it being such is without legal support. A similar argument was rejected by the Second Circuit when it faced the question "May the Port of New York Authority bar the use of its terminal to all exercises of First Amendment rights?" *Wolin v. Port of New York Authority,* 392 F.2d 83 (2nd Cir. 1968). The answer was no for the Port Authority and it is no for the Board of Airport Commissioners. Streets, parks and airports do not become public forums because government consents to their use as such. They are public forums, as the Supreme Court explained in *Hague,* because they are traditional gathering places for the citizenry. They are held in trust by government for public use.

In recent years the Supreme Court has grappled with difficult questions of what constitutes a public forum. *E.g., Members of City Council v. Taxpayers for Vincent,* ____ U.S. ____ 104 S.Ct. 2118 (1984) (lamposts); *U.S. Postal Service v. Council of Greenburgh,* 453 U.S. 114, 101 S.Ct. 2676 (1981) (mailboxes). Despite the difficulty in applying public forum analysis to all government property "generally an analysis of whether property is a public forum provides a workable analytical tool." *Members of City Council v. Taxpayers for Vincent,* 104 S.Ct. at 2134 n. 32. Public forum analysis is a workable tool here. This is not a difficult case. An airport used by an estimated 60 million people a year is a public forum. First amendment activity cannot be banned at LAX. Resolution No. 13787

is unconstitutional. Defendants are enjoined from enforcing it.

Judgment is entered for plaintiffs.

DATED: March 25, 1985.

EDWARD RAFEEDIE
United States District Judge

APPENDIX 1

STIPULATION OF FACTS

1. The City of Los Angeles ("City") is a municipal corporation and is the owner of the real property and facilities commonly known as Los Angeles International Airport (hereinafter "LAX").

2. The Board of Airport Commissioners of the City of Los Angeles (hereinafter "Board" is charged by the Los Angeles City Charter with the management and control of the Los Angeles Department of Airports (hereinafter "Department").

3. The Department is a department of the City and operates LAX under the direction and control of the Board.

4. The LAX complex encompasses approximately 3500 acres consisting of three general areas: (A) the restricted or "field side" area containing runways, taxiways, airline maintenance and cargo facilities, aircraft loading ramps, and various aircraft service facilities; (B) Airport-owned property surrounding the restricted area; and (C) the Central Terminal Area (hereinafter "CTA") which contains the terminal facilities (ticketing counter, baggage claim, waiting and loading gates), parking structures, and a series of private streets and roadways which provide vehicular access to the CTA. There are presently eight (8) terminal buildings open to the public for Airport use at LAX. Each of these eight (8) terminal facilities contain large areas open to the public, including the pedestrian walkways, ticketing and baggage claim areas, baggage lockers, check-in gates, loading gates, cocktail lounges, waiting areas, aircraft loading gates, restaurants, newsstands, gift shops, barber shops, art displays (see paragraph 28), information displays, flight insurance counters, rent-a-car counters, hotel, motel, restaurant and ground transportation advertising displays,

rest areas, including chairs and benches, restrooms, automatic travellers check and banking machines and general waiting areas. Most of these terminal facilities have offices for Airport tenants which are generally not open to the public.

5. The public is permitted unrestricted access to the portions of the airport terminal interiors identified in Paragraph 4(C), above.

6. As a part of the expansion program at LAX, a second level roadway system has been constructed which essentially duplicated the existing roadway system by creating an upper level, or second level, roadway system above the surface roads. This second level roadway system was designed to alleviate, at least in part, the vehicular and pedestrian congestion at LAX.

7. As a part of the expansion program, each of the terminal facilities was expanded (or is presently being expanded) to provide access to those facilities from the upper level roadway. Thus, a passenger departing from LAX generally arrives on the upper level roadway, enters the terminal facility and proceeds after any necessary ticketing and baggage check-in to the waiting areas and terminal gates. A passenger arriving at LAX by air disembarks from the aircraft and proceeds, at least in most terminals, on a lower level tunnel to the baggage claim area and then out of the terminal on to the sidewalk and to any required ground transportation.

8. The planned expansion and construction project at LAX has recently been substantially completed. This expansion of existing terminals and construction of new terminals at LAX has had the effect of reducing the levels of pedestrian and vehicular congestion both inside and outside of the terminal complexes to levels below those

which existed prior to the commencement of the expansion and construction project.

9. In front of the terminal facilities on both levels of the roadway are sidewalks which extend approximately twelve (12) to sixteen (16) feet from the terminal entrance.

10. LAX is the third busiest airport in the world. LAX handled more than 32 million passengers in 1982, more than 33 million passengers in 1983, and it is anticipated will handle more than 34 million passengers in 1984. It is estimated that at least an equal number of "meeters and greeters" enter the CTA to pick up or drop off airline passengers.

11. LAX is the largest destinational airport in the world with the largest number of enplaning and deplaning passengers.

12. Approximately 75 percent of the passengers who use LAX commence or terminate their flight travel at LAX.

13. Approximately 25 percent of the passengers who use LAX do not commence or terminate their flight travel at LAX.

14. Because approximately 75 percent of the passengers either commence or terminate their flight travel at LAX, at least 75 percent of the passengers must use the sidewalk area in front of the terminal facilities.

15. Because approximately 25 percent of the passengers do not either commence or terminate their flight travel at LAX, at least 25 percent of the passengers do not use the sidewalk area in front of the terminal facilities.

16. Article XXIV, section 238.8 of the Los Angeles City Charter provides as follows:

The Board shall have power to grant franchises, permits and licenses to, and to enter into leases with, any person, firm or corporation, or agency of the government for the use of any municipally owned or controlled airport or any part of facility thereof, for the promotion and accommodation of air commerce and air navigation, or use incidental thereto, together with the right to use said airport in common with others as necessary to the right granted. (Amended, 1951.)

The Board shall likewise have power to enter into leases with any person, firm or corporation for purposes other than for the promotion and accommodation of air commerce and air navigation covering any portion of the airport property whenever the Board shall determine that the use of such portion of the Airport property is not necessary for the promotion and accommodation of air commerce and air navigation or use incidental thereto.

17. Article XXIV, section 239.5 of the Los Angeles Charter provides as follows:

Whenever it shall be determined by the Board by order that certain parts of any airport owned, operated or controlled by the city may not be required at such time for use in connection with, or for the promotion and accommodation of air commerce and air navigation, the general manager shall have power to issue revocable permits to use limited portions of such space for any and all purposes which shall not interfere with air commerce or air navigation and not inconsistent with any trust upon which such land may be held by the City of Los Angeles. Every such permit shall first be approved by the Board and shall prescribe that it shall be revocable, without compensation to the lessee or permittee, upon due notice to

be stated therein, such notice in no case to exceed one year.

18. For the use of the terminal facilities, the Department has entered into permits, license agreements, leases, and concession agreements to provide food and beverage service, news and gift facilities, flight insurance, money exchange facilities, ground transportation, waiting areas, ticket counters, lockers, and baggage facilities.

19. The Defendants believe that the services and facilities that the Department has permitted within the terminal facilities at LAX are designed to aid the traveling public and to promote and accommodate air commerce and navigation.

20. The Department has attempted to limit the use of the terminal facilities to those uses which it believes directly aid the traveling public and thereby promote and accommodate air commerce and air navigation.

21. In the Department's opinion, it has never given a license permit or lease which allows any non-airport related commercial use of the terminal facilities.

22. During at least the past ten (10) years, a variety of religious and/or political groups have utilized the interior area of terminals at LAX, including the pedestrian walkways located therein, to distribute literature, solicit funds, and communicate ideas.

23. Defendants are or have been aware that a variety of religious and/or political groups have conducted distribution, solictation, or communication activities at LAX without the express or implied permission of the Board or D.O.A.

24. As to the activities described in Paragraphs 22 and 23, above, defendants often became aware of many of the groups engaging in those activities only after the

group had conducted its activity and had left the terminal facilities.

25. The interior of terminal areas at LAX, including the pedestrian walkways located therein, have been utilized on a number of occasions by print, television and radio media for the purpose of filming, photographing and/or interviewing public figures, such as political candidates, the Mayor of Los Angeles, and the chairman of the Los Angeles Olympic Organizing Committee. On several occasions, numerous individuals and news media personnel have gathered inside the terminal facilities at LAX to greet some of the sports teams that were returning from road games.

26. Defendants have obtained knowledge of some of the activities described in Paragraph 25 above, but often that knowledge was obtained after the event occurred.

27. A picture of the Mayor of the City of Los Angeles is displayed in each of the terminals at LAX on a sign that states "Mayor Tom Bradley Salutes the New LAX — Gateway to the Olympics."

28. Artwork created by children that depicts airport scenes has been displayed in the terminal facilities with the express knowledge and permission of the defendants.

29. A display entitled "Think Before You Buy", containing specimens, pictures, and information pertaining to protected species, has been constructed and maintained inside terminal 2 at LAX with the express knowledge and permission of defendants. The text of this display reads as follows:

> This exhibit was designed and installed by the Natural History Museum of Los Angeles County in cooperation with the Los Angeles City Attorney's Office, U.S. Fish and Wildlife Service, National Marine Fisheries Service and the Los Angeles Department

of Airports. Major assistance and funding was provided by TRAFFIC (U.S.A.) — Trade Records Analysis of Flora and Fauna in Commerce — a scientific, fact-finding program of World Wildlife Fund — U.S. monitoring the international trade in wild animals and plants.

30. A photographic display depicting photographs of various athletes was constructed and maintained inside terminal 7 at LAX for approximately two (2) to three (3) weeks in 1984 without the express knowledge and permission of defendants. The text of this display reads as follows:

> Photographs of America's Olympic Hopefuls. Sponsored by the Shooting for the Gold Foundation with a grant from Fuji Photo Film U.S.A. Inc.

31. The defendants have not restricted access by members of the general public to the interior of terminal areas at LAX to only those persons who are engaged in the use of the LAX facilities for interstate travel or for purposes of meeting or greeting airline passengers. The defendants do not attempt to restrict members of the general public from walking through the unrestricted interior of terminal areas at LAX. Defendants do not attempt to restrict members of the general public who have no purpose or desire to utilize the transportation-related facilities within the terminal areas at LAX from walking, reading, shopping, eating, drinking, and conversing with other members of the general public in the interior of terminal areas at LAX.

32. The defendants have not in the past, and do not in the present, prohibit persons wearing T-shirts or other articles of clothing imprinted with slogans, statements, or other forms of religious or political communication from walking in the interior terminal areas of LAX.

33. The defendants have expressly allowed the exercise of commercial speech in the interior of terminal areas of LAX, including areas directly attached to or in the vicinity of the pedestrian walkways located therein, in the form of advertising displays in connection with hotel, motel, restaurant, ground transportation and other services offered by commercial vendors which the defendants believe are of interest to the traveling public.

34. The expansion of LAX has been advertised on buses owned and/or operated by the Southern California Rapid Transit District and on buses owned or operated by the D.O.A. The defendants were aware of this advertising but did not exercise their right to prohibit it.

35. The defendants have promoted the new facilities at LAX through press releases to print, television and radio media and through the purchase of radio advertising.

36. Immediately prior to, and during the 1984 summer Olympic Games in Los Angeles, free standing "Olympic Family" booths were set up by the LAOOC with the express consent of the defendants within the terminal areas at LAX. The purpose of the booths was to provide information to athletes and/or other Olympic officials who were members of the "Olympic Family." Upon request, personnel working in said booths provided general information to members of the general public.

37. On approximately July 25, 1984, television crews filmed a demonstration of the operation of a Mobile Emergency Rescue Vehicle (MERV) inside a terminal at LAX for subsequent broadcast to the public on commercial television networks. MERV is part of the medical response program provided by defendants at LAX.

38. Defendants have known that various people and groups have wished to conduct and, in some instances,

have conducted speech-related activities within the terminal areas at LAX.

39. The activities described in Paragraph 38, above, were conducted against the wishes and policies of defendants and without the express permission of defendants.

40. The Department has never given the Plaintiffs, or any of them, explicit permission to distribute free religious literature within the terminal facilities at LAX.

41. The Plaintiffs, and each of them, have distributed free religious literature within the terminal facilities at LAX during the past ten years.

42. In the past, the Department has received a variety of requests from people in numerous organizations who wish to conduct activities which defendants believed were non-airport related, including First Amendment activities, within the terminal facilities at LAX. Examples of organizations which have requested, but have been denied, permission to u[illegible]he terminal facilities are: The Red Cross, Salvation Army, Girl Scouts, Boy Scouts, Ford Motor Company, Iran Relief Fund, Hunger Campaign, KCET, Women's Sports Foundation, and Verdi Restorante.

43. The Department has denied the requests referred to in paragraph 42 to conduct First Amendment activities within the terminal facilities and has thus precluded those activities from taking place within the terminal areas of LAX.

44. The Department is a department of the City and is financially self-sufficient and does not rely on or use tax revenues to finance its operations.

45. The monies necessary to pay for the operation and the development of LAX are collected from all persons

using or occupying LAX on a consistent and regular basis.

46. Individual members of the traveling public and other members of the general public who enter and/or utilize the interior terminal areas at LAX are not charged any fee by the Department for their use of the terminal facilities.

47. Most persons occupying space on an extended basis within the terminal facilities pay either a rental based on the square feet occupied or a percentage of gross revenues derived from the use of that space or both. For example, the concession agreements and leases with the rent-a-car companies require that those companies pay a rent for the space occupied inside their terminal facilities and also a percentage of gross receipts in order to conduct their business at LAX. The news and gift stands and the food and beverage stands within the terminal facilities pay both rent and a percentage of gross receipts on a similar basis. Air carriers also pay a square-footage rental based on the area they occupy within the terminal facilities for ticket counters, baggage claim areas, waiting areas, and loading gates. In addition, air carriers pay a landing fee based on the weight of the aircraft which land at LAX.

48. The only exceptions to the policy set forth in paragraph 47 above are: (a) the various federal inspection services such as customs and immigration; (b) the Travelers Aid Society which provides information services to the traveling public; and (c) the USO which provides assistance to military travelers.

49. The monies collected from rents, concession fees, permit charges and landing fees described in paragraph 47 above pay for the Department's bonded indebtedness and the expenses necessary to operate LAX.

50. The Board has attempted to limit use of the terminal facilities at LAX to those activities which it believes directly aid the traveling public.

51. The Board has not expressly permitted any commercial or First Amendment activities within the CTA which defendant believes are unrelated to LAX and the services it provides.

52. On July 13, 1983, the Board passed Resolution No. 13787.

53. The only exception to the rules set forth in Resolution No. 13787 provides that anyone wishing to exercise his First Amendment rights within the CTA must do so on the sidewalks outside of and in front of the terminal buildings.

54. Resolution No. 13787 does not prohibit, and the defendants have never prohibited, anyone from entering the terminal facilities at LAX.

55. Jews for Jesus, Inc. ("Jews for Jesus") is a nonprofit religious corporation duly organized and operating pursuant to, the laws of the state of California.

56. Jews for Jesus is an expression of the Christian faith which, as one of its principle purposes, preaches the Gospel of Jesus Christ, and promotes religious ideals consistent with the Old Testament and the New Testament.

57. Avi Snyder ("Snyder") is an individual member and minister of Jews for Jesus and is the Los Angeles director of Jews for Jesus.

58. The acts and practices of all of the named defendants and their agents, as described herein, were performed under color of state law and were actions of the state within the meaning of 42 U.S.C. § 1983 and Fourteenth Amendment to the United States Constitution.

59. Snyder, and other members of the plaintiff Jews for Jesus, have on several occasions distributed literature inside the terminal facilities at LAX.

60. Distribution of religious literature and leaflets, free of charge by members of Jews for Jesus, including Snyder, provides information to the general public about the religious teachings of Christianity and is a method by which plaintiffs evangelize.

61. It is the express policy of Jews for Jesus that its members, including Snyder, must neither solicit nor accept, any money whatsoever, while distributing free religious literature in the terminal buildings of LAX.

62. Jews for Jesus has a general policy which forbids its members, including Snyder, while engaged in the free distribution of religious literature at any location, including the interior terminal walkways of LAX, from harassing, interfering with, blocking, obstructing, physically touching or otherwise intentionally annoying any other person.

63. The parties are not aware of any occasion on which a member of Jews for Jesus, including Snyder, while engaged in the free distribution of religious literature in the interior terminal walkways of LAX, has intentionally harassed, interfered with, blocked, obstructed, physically touched in an offensive manner or otherwise intentionally annoyed any other person.

64. Only July 13, 1983, the Board, acting pursuant to authority vested in it by City, enacted Resolution No. 13787. This resolution, on its face, bans, among other things, all "First Amendment activities" from the interior of terminal areas at LAX otherwise open to the public without restriction, including the pedestrian walkways located within said terminals.

65. Resolution No. 13787 purports to ban all airport activities which defendants believe to be non-airport related.

66. Resolution No. 13787 allows the conduct of First Amendment activities on the sidewalks immediately outside of the terminals located at LAX.

67. Only July 6, 1984, at approximately 10:00 a.m. in LAX Terminal 4, Snyder was engaged in the distribution of Jews for Jesus religious literature on a pedestrian walkway. In distributing the religious literature, Snyder was not blocking any entrance, exit, stairway, escalator, elevator, door, or otherwise inhibiting the free flow of pedestrian traffic on the pedestrian walkway located inside Terminal 4 at LAX.

68. During the distribution of free religious literature as described in Paragraph 67, Snyder was not touching, annoying blocking, obstructing, or otherwise harassing any other person present in the immediate vicinity of his location on the pedestrian walkway located in the interior of Terminal 4 at LAX.

69. At or about the time that Snyder was engaged in the activities described in Paragraph 67 and 68, above, a uniformed peace officer, acting pursuant to Resolution 13787, approached Snyder and handed him a copy of Resolution 13787. Pursuant to the policy of the defendants as reflected in the Resolution, the peace officer ordered Snyder to cease distribution of any literature within the terminal areas at LAX, including the pedestrian walkways where the activities had, up to that point, been conducted. The peace officer further advised Snyder that any failure to comply with his order would subject Snyder to legal action by the City Attorney pursuant to the express terms of Resolution No. 13787. Snyder ceased

the distribution of literature and left the interior terminal in compliance with the order of the peace officer.

70. The acts of the peace officer as described in Pargraph 69, above, were performed under color of state law pursuant to the express policy of the Board as set forth in Resolution No. 13787 had the purpose and effect of preventing Snyder from engaging in the distribution of free religious literature anywhere inside the LAX terminal buildings, including the pedestrian walkway where he had been engaged in the distribution of free religious literature.

71. Defendants have prevented and/or chilled, (and will continue to prevent and/or chill) plaintiffs' distribution of free religious literature inside the terminal areas at LAX pursuant to upon Resolution No. 13787.

72. If, as the plaintiffs contend, Resolution No. 13787 is unconstitutional on its face or as applied to plaintiffs' activities inside of the terminal areas at LAX, then plaintiffs have suffered, are suffering, and will continue to suffer irreparable harm.

73. If, as the plantiffs contend, Resolution No. 13787 is unconstitutional on its face or is applied to plaintiffs' activities, plaintiffs have no plain, speedy, speedy or adequate remedy at law to addresss said constitutional violations and any of the remedies to which plaintiff could be relegated would be attended by such uncertainties and delays that they would cause further irreparable damages, injury and inconvenience to plaintiffs. Damages are not adequate to protect plaintiffs from the continuing injury which would arise from said constitutional violations.

74. Defendants permit the operation of a Christian Science Reading Room inside terminal 7. This Reading Room is open to the public. The Reading Room displays

religious literature pertaining to the Christian Science faith. The Reading room has been in operation in the same location inside of the terminal building since 1966. The Reading Room has occupied and now occupies leased space for which it pays a monthly rental of $510.00.

APPENDIX 2

RESOLUTION NO. 13787

WHEREAS, pursuant to City of Los Angeles Charter Section 238.4, the Board of Airport Commissioners shall have possession, management, charge, superintendence and control of all airports, airport sites, and all equipment, accommodations and facilities for aerial navigation, flight, instruction and commerce belonging to or pertaining to this city; and

WHEREAS, pursuant to Charter Section 238.5, the Board shall fix, regulate and collect rates or charges for the use of all buildings, grounds, facilities, utilities and structures which are owned, controlled or operated by the city in connection with or for the promotion or accommodation of air commerce and air navigation, and for services in connection therewith; and

WHEREAS, pursuant to Charter Section 238.8, the Board shall have the power to grant franchises, permits and licenses to and to enter into leases with any person, firm or corporation, or agency of the government for the use of any municipally owned or controlled airport or any part of facility thereof, for the promotion and accommodation of air commerce and air navigation or use incidental thereto; and

WHEREAS, also pursuant to Section 238.8 of the City Charter, the Board shall have the power to enter into leases for purposes other than for the promotion and accommodation of air commerce and air navigation covering any portion of the airport property whenever the Board shall determine that the use of such portion of the airport property is not necessary for the promotion and accommodation of air commerce and air navigation or uses incidental thereto; and

WHEREAS, the Board considers the Central Terminal Area, which for purposes of this Resolution consists of

the ticketing and satellite facilities and the parking structures and areas and streets, roadways and bridges adjacent thereto at Los Angeles International Airport to be vital facilities for the promotion and accommodation of air commerce and air navigation and uses incidental thereto; and

WHEREAS, the existing Central Terminal Area at Los Angeles International Airport currently accommodates and processes approximately 34 million annual passengers and an equal number of meeters and greeters; and

WHEREAS, the Board of Airport Commissioners is currently engaged in an expansion program of Central Terminal Area at Los Angeles International Airport due to the extreme congestion in the Central Terminal Area; and

WHEREAS, the projected growth of air passenger traffic at Los Angeles International Airport is anticipated to reach a level of 40 million annual passengers by the year 1986; and

WHEREAS, the primary purpose of expanding the Central Terminal Area at Los Angeles International Airport is to accommodate more efficiently the traveling public at Los Angeles International Airport and to enhance the promotion and accommodation of air commerce and air navigation or uses incidental thereto; and

WHEREAS, even with the expanded Central Terminal Area at Los Angeles International Airport said facilities will continue to experience high periods of passenger traffic and congestion; and

WHEREAS, it is the objective of the Board of Airport Commissioners to keep the Central Terminal Area as free as possible from congestion and obstructions as an aid to the traveling public and in the promotion of air commerce and air navigation and uses incidental thereto; and

WHEREAS, in recognition of its Charter duty to accommodate and promote air commerce and air navigation and uses incidental thereto, the Board of Airport Commissioners determines that due to the vital nature of the Central Terminal Area, no portion thereof should be utilized for a purpose not connected with the promotion and accommodation of air commerce and air navigation and uses incidental thereto; and

WHEREAS, over the past several years, various individuals and/or entities have attempted to engage in First Amendment activities within the Central Terminal Area; and

WHEREAS, said individuals and/or entities engaging in such First Amendment activities have significantly interfered with the free flow of passenger traffic in the Central Terminal Area at Los Angeles International Airport and substantially contributed to the congestion in said Central Terminal Area; and

WHEREAS, such interference with passenger traffic and congestion caused by First Amendment activities in the Central Terminal Area are counterproductive to the objectives of the Board in accommodating air commerce and air navigation or uses incidental thereto; and

WHEREAS, engaging in First Amendment activities in the Central Terminal Area at Los Angeles International Airport is incompatible with the character and function of said Central Terminal Area; and

WHEREAS, the Board of Airport Commissioners does not issue permits at Los Angeles International Airport to individuals and/or entities to engage in First Amendment activities within the Central Terminal Area at Los Angeles International Airport; and

WHEREAS, over the years, the various individuals and/or entities which have engaged in First Amendment

activities within the Central Terminal Area at Los Angeles International Airport have done so without the consent or approval of the Board of Airport Commissioners; and

WHEREAS, extensive litigation involving various city ordinances and state statutes has not resolved the issue of whether the Central Terminal Area at Los Angeles International Airport constitutes an area which is open for the conduct of First Amendment activities; and

WHEREAS, the Board of Airport Commissioners, irrespective of the extensive litigation involving First Amendment activities at Los Angeles International Airport, has never opened the Central Terminal Area at Los Angeles International Airport to First Amendment activities; and

WHEREAS, in the prudent management of Los Angeles International Airport and in order to avoid congestion and interference with the promotion and accommodation of air commerce and air navigation and uses incidental thereto and in order to protect passengers in the Central Terminal Area from unwanted or disruptive intrusions, the Board of Airport Commissioners herein determines that the Central Terminal Area of Los Angeles International Airport is not open to individuals or entities engaging in First Amendment activities; and

WHEREAS, if any entity and/or individual seeks to engage in First Amendment activities in the vicinity of the Central Terminal Area, those activities must be conducted only on the sidewalks in front of the ticketing buildings and in such a manner so as not to interfere with other persons; and

NOW, THEREFORE, BE IT RESOLVED by the Board of Airport Commissioners that the Central Terminal Area at Los Angeles International Airport is not open for First Amendment activities by any individual and/or entity;

BE IT FURTHER RESOLVED that the Central Terminal Area at Los Angeles International Airport is only to be used for the promotion and accommodation of air commerce and air navigation or uses incidental thereto unless the Board of Airport Commissioners makes the appropriate findings pursuant to Charter Section 238.8 that a portion of said area is not currently required for the promotion or accommodation of air navigation or uses incidental thereto; and

BE IT FURTHER RESOLVED that after the effective date of this Resolution, if any individual and/or entity seeks to engage in First Amendment activities within the Central Terminal Area at Los Angeles International Airport, said individual and/or entity shall be deemed to be acting in contravention of the stated policy of the Board of Airport Commissioners in reference to the uses permitted within the Central Terminal Area at Los Angeles International Airport; and

BE IT FURTHER RESOLVED that if any individual or entity engages in First Amendment activities within the Central Terminal at Los Angeles International Airport, the City Attorney of the City of Los Angeles is directed to institute appropriate litigation against such individual and/or entity to ensure compliance with this Policy statement of the Board of Airport Commissioners; and

BE IT FURTHER RESOLVED if any entity or individual seeks to engage in First Amendment activities in the vicinity of the Central Terminal Area, those activities must be conducted only on the sidewalks in front of the ticketing buildings and in such manner so as to not interfere with other persons; and

BE IT FURTHER RESOLVED that Department management is directed to monitor the conduct of any First Amendment activities on the sidewalks in front of the

ticketing buildings and report periodically to the Board regarding such activities in order for the Board to ascertain whether any restrictions should be implemented concerning said activities; and

BE IT FURTHER RESOLVED that this action, a general policy procedure, is exempt from the requirements of the California Environmental Quality Act as provided by Article III, Section 2.n. of the Los Angeles City CEQA Guidelines.

I hereby certify that the foregoing is a true and correct copy of Resolution No. 13787 adopted by the Board of Airport Commissioners at a special meeting held Wednesday, July 13, 1983.

ELAINE E. STANIEC — Secretary
Board of Airport Commissioners

APPENDIX C

RESOLUTION NO. 13787

WHEREAS, pursuant to City of Los Angeles Charter Section 238.4, the Board of Airport Commissioners shall have possession, management, charge, superintendence and control of ail airports, airport sites, and all equipment, accommodations and facilities for aerial navigation, flight, instruction and commerce belonging to or pertaining to this city; and

WHEREAS, pursuant to Charter Section 238.5, the Board shall fix, regulate and collect rates or charges for the use of all buildings, grounds, facilities, utilities and structures which are owned, controlled or operated by the city in connection with or for the promotion or accommodation of air commerce and air navigation; and for services in connection therewith; and

WHEREAS, pursuant to Charter Section 238.8, the Board shall have the power to grant franchises, permits and licenses to and to enter into leases with any person, firm or corporation, or agency of the government for the use of any municipally owned or controlled airport or any part of facility thereof, for the promotion and accommodation of air commerce and air navigation or use incidental thereto; and

WHEREAS, also pursuant to Section 238.8 of the City Charter, the Board shall have the power to enter into leases for purposes other than for the promotion and accommodation of air commerce and air navigation covering any portion of the airport property whenever the Board shall determine that the use of such portion of the airport property is not necessary for the promotion and accommodation of air commerce and air navigation or uses incidental thereto; and

WHEREAS, the Board considers the Central Terminal Area, which for purposes of this Resolution consists of

the ticketing and satellite facilities and the parking structures and areas and streets, roadways and bridges adjacent thereto at Los Angeles International Airport to be vital facilities for the promotion and accommodation of air commerce and air navigation and uses incidental thereto; and

WHEREAS, the existing Central Terminal Area at Los Angeles International Airport currently accommodates and processes approximately 34 million annual passengers and an equal number of meeters and greeters; and

WHEREAS, the Board of Airport Commissioners is currently engaged in an expansion program of Central Terminal Area at Los Angeles International Airport due to the extreme congestion in the Central Terminal Area; and

WHEREAS, the projected growth of air passenger traffic at Los Angeles International Airport is anticipated to reach a level of 40 million annual passengers by the year 1986; and

WHEREAS, the primary purpose of expanding the Central Terminal Area at Los Angeles International Airport is to accommodate more efficiently the traveling public at Los Angeles International Airport and to enhance the promotion and accommodation of air commerce and air navigation or uses incidental thereto; and

WHEREAS, even with the expanded Central Terminal Area at Los Angeles International Airport said facilities will continue to experience high periods of passenger traffic and congestion; and

WHEREAS, it is the objective of the Board of Airport Commissioners to keep the Central Terminal Area as free as possible from congestion and obstructions as an aid to the traveling public and in the promotion of air commerce and air navigation and uses incidental thereto; and

WHEREAS, in recognition of its Charter duty to accommodate and promote air commerce and air navigation and uses incidental thereto, the Board of Airport Commissioners determines that due to the vital nature of the Central Terminal Area, no portion thereof should be utilized for a purpose not connected with the promotion and accommodation of air commerce and air navigation and uses incidental thereto; and

WHEREAS, over the past several years, various individuals and/or entities have attempted to engage in First Amendment activities within the Central Terminal Area; and

WHEREAS, said individuals and/or entities engaging in such First Amendment activities have significantly interfered with the free flow of passenger traffic in the Central Terminal Area at Los Angeles International Airport and substantially contributed to the congestion in said Central Terminal Area; and

WHEREAS, such interference with passenger traffic and congestion caused by First Amendment activities in the Central Terminal Area are counterproductive to the objectives of the Board in accommodating air commerce and air navigation or uses incidental thereto; and

WHEREAS, engaging in First Amendment activities in the Central Terminal Area at Los Angeles International Airport is incompatible with the character and function of said Central Terminal Area; and

WHEREAS, the Board of Airport Commissioners does not issue permits at Los Angeles International Airport to individuals and/or entities to engage in First Amendment activities within the Central Terminal Area at Los Angeles International Airport; and

WHEREAS, over the years, the various individuals and/or entities which have engaged in First Amendment

activities within the Central Terminal Area at Los Angeles International Airport have done so without the consent or approval of the Board of Airport Commissioners; and

WHEREAS, extensive litigation involving various city ordinances and state statutes has not resolved the issue of whether the Central Terminal Area at Los Angeles International Airport constitutes an area which is open for the conduct of First Amendment activities; and

WHEREAS, the Board of Airport Commissioners, irrespective of the extensive litigation involving First Amendment activities at Los Angeles International Airport, has never opened the Central Terminal Area at Los Angeles International Airport to First Amendment activities; and

WHEREAS, in the prudent management of Los Angeles International Airport and in order to avoid congestion and interference with the promotion and accommodation of air commerce and air navigation and uses incidental thereto and in order to protect passengers in the Central Terminal Area from unwanted or disruptive intrusions, the Board of Airport Commissioners herein determines that the Central Terminal Area at Los Angeles International Airport is not open to individuals or entities engaging in First Amendment activities; and

WHEREAS, if any entity and/or individual seeks to engage in First Amendment activities in the vicinity of the Central Terminal Area, those activities must be conducted only on the sidewalks in front of the ticketing buildings and in such a manner so as not to interfere with other persons; and

NOW, THEREFORE, BE IT RESOLVED by the Board of Airport Commissioners that the Central Terminal Area at Los Angeles International Airport is not open for First Amendment activities by any individual and/or entity;

BE IT FURTHER RESOLVED that the Central Terminal Area at Los Angeles International Airport is only to be used for the promotion and accommodation of air commerce and air navigation or uses incidental thereto unless the Board of Airport Commissioners makes the appropriate findings pursuant to Charter Section 238.8 that a portion of said area is not currently required for the promotion or accommodation of air navigation or uses incidental thereto; and

BE IT FURTHER RESOLVED that after the effective date of this Resolution, if any individual and/or entity seeks to engage in First Amendment activities within the Central Terminal Area at Los Angeles International Airport, said individual and/or entity shall be deemed to be acting in contravention of the stated policy of the Board of Airport Commissioners in reference to the uses permitted within the Central Terminal Area at Los Angeles International Airport; and

BE IT FURTHER RESOLVED that if any individual or entity engages in First Amendment activities within the Central Terminal Area at Los Angeles International Airport, the City Attorney of the City of Los Angeles is directed to institute appropriate litigation against such individual and/or entity to ensure compliance with this Policy statement of the Board of Airport Commissioners; and

BE IT FURTHER RESOLVED if any entity or individual seeks to engage in First Amendment activities in the vicinity of the Central Terminal Area, those activities must be conducted only on the sidewalks in front of the ticketing buildings and in such a manner so as to not interfere with other persons; and

BE IT FURTHER RESOLVED that Department management is directed to monitor the conduct of any First

Amendment activities on the sidewalks in front of the ticketing buildings and report periodically to the Baord regarding such activities in order for the Board to ascertain whether any restrictions should be implemented concerning said activities; and

BE IT FURTHER RESOLVED that this action, a general policy procedure, is exempt from the requirements of the California Environmental Quality Act as provided by Article III, Section 2.n. of the Los Angeles City CEQA Guidelines.

I hereby certify that the foregoing is a true and correct copy of Resolution No. 13787 adopted by the Board of Airport Commissioners at a special meeting held Wednesday, July 13, 1983.

ELAINE E. STANIEC — Secretary
BOARD OF AIRPORT
COMMISSIONERS

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

On July 21, 1986 I served the within Petition for Writ of Certiorari in re: "The Board of Airport Commissioners of The City of Los Angeles v. Jews for Jesus" in the United States Supreme Court, October Term 1985, No. 85-5808;

on the Parties in said action, by placing 3 copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

Meserve, Mumpher & Hughes
Bruce A. Gothelf
Joel D. Covelman
333 South Hope Street
35th Floor
Los Angeles, CA 90071

Attorneys for Respondents

All parties required to be served have been served.

I certify (or declare), under penalty of perjury, that the foregoing is true and correct.

Executed on July 21, 1986, at Los Angeles, California

Ce Ce Medina

CE CE MEDINA

Supreme Court, U.S.
FILED
SEP 8 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-104

In The

Supreme Court of the United States

October Term, 1985

THE BOARD OF AIRPORT COMMISSIONERS OF THE CITY OF LOS ANGELES, *ET AL.*,

Petitioners,

vs.

JEWS FOR JESUS, INC.
AND ALAN HOWARD SNYDER,
a/k/a AVI SNYDER,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION FOR THE RESPONDENTS

ANDREW J. EKONOMOU
515 Rhodes-Haverty Building
134 Peachtree Street, N.W.
Atlanta, Georgia 30303
(404) 221-1000
Counsel for Respondents

OF COUNSEL:
JAY ALAN SEKULOW
The Standard Building
92 Luckie Street, N.W.
Atlanta, Georgia 30303
(404) 522-7185

COCKLE LAW BRIEF PRINTING CO., (800) 228-8845 (tone) 75
or call collect (402) 342-2831

QUESTIONS PRESENTED

I. Whether the Central Terminal Area of the Los Angeles International Airport, which Petitioners have opened to unrestricted public access, constitutes a traditional public forum such that a resolution prohibiting all First Amendment activity must be narrowly drawn to accomplish a compelling governmental interest?

II. Whether Petitioners have opened the Central Terminal Area of the Los Angeles International Airport for use by the public as a place for expressive activities by consenting to the exercise of certain First Amendment activity within it?

III. If the Central Terminal Area of the Los Angeles International Airport is not a public forum, whether a resolution absolutely prohibiting First Amendment activities is reasonable when certain expressive activity is permitted and when during the past ten years the walkways of the interior terminal have been utilized by various groups to distribute literature and communicate ideas?

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Authorities	iii
Statement of the Case	1
Reasons for Not Granting the Writ:	
1. The United States Court of Appeals for the Ninth Circuit correctly held that the Central Terminal Area of the Los Angeles International Airport, which has been opened to unrestricted public access, is a traditional public forum.	6
2. Petitioners have opened the Central Terminal Area of the Los Angeles International Airport to the exercise of expressive activities.	13
3. Petitioners have failed to show that an absolute prohibition of First Amendment activities in the Central Terminal Area of the Los Angeles International Airport is reasonable.	14
Conclusion	19

TABLE OF AUTHORITIES

Page

CASES CITED

Cantwell v. Connecticut, 310 U.S. 296 (1940) 17

Chicago Area Military Project v. City of Chicago, 508 F.2d 921 (7th Cir. 1975), *cert. denied*, 421 U.S. 992 (1975) 6, 9

Cornelius v. NAACP Legal Defense & Educational Fund, Inc., 105 S.Ct. 3439 (1985) 10, 11, 13, 15

Fernandez v. Limmer, 663 F.2d 619 (5th Cir. 1981), *cert. dismissed*, 458 U.S. 1124 (1982) 6, 8

Gannett Satellite Information Network v. Metropolitan Transportation Authority, 745 F.2d 767 (2d Cir. 1984) 7

Hague v. CIO, 307 U.S. 496 (1939) 9

Heffron v. International Society for Krishna Consciousness, Inc., 452 U.S. 640 (1981) 13, 15, 17, 18

International Society for Krishna Consciousness, Inc. v. Collins, 452 F.Supp. 1007 (S.D. Tex. 1977), *vacated*, 609 F.2d 151 (5th Cir. 1980) 7

International Society for Krishna Consciousness of Atlanta v. Eaves, 601 F.2d 809 (5th Cir. 1979) 6, 9

International Society for Krishna Consciousness, Inc. v. Engelhardt, 425 F.Supp. 176 (W.D. Mo. 1977) 6

International Society for Krishna Consciousness, Inc. v. Lentini, 461 F.Supp. 49 (E.D. La. 1978) 6, 7

International Society for Krishna Consciousness, Inc. v. Rochford, 585 F.2d 263 (7th Cir. 1978) 6, 9

International Society for Krishna Consciousness, Inc. v. Wolke, 453 F.Supp. 869 (E.D. Wis. 1978) 6

Jews for Jesus, Inc. v. Board of Airport Commissioners, 785 F.2d 791 (9th Cir. 1986) 7, 10, 11

Kuszynski v. City of Oakland, 479 F.2d 1130 (9th Cir. 1973) 6, 9

TABLE OF AUTHORITIES—Continued

Page

Penthouse International v. Koch, 599 F.Supp. 1338 (S.D.N.Y. 1984) 7

Perry Education Association v. Perry Local Educators' Association, 460 U.S. 37 (1983) 11, 13, 14

Members of City Council v. Taxpayers for Vincent, 466 U.S. 789 (1984) 15, 17, 18

Moskowitz v. Cullman, 432 F.Supp. 1263 (D.N.J. 1977) 7

Rosen v. Port of Portland, 641 F.2d 1243 (9th Cir. 1981) 6

Schneider v. State, 308 U.S. 147 (1939) 17

United States v. Grace, 461 U.S. 171 (1983) 12

United States Southwest Africa/Nambia Trade & Cultural Council v. United States, 708 F.2d 760 (D.C. Cir. 1983) 6, 7

Widmar v. Vincent, 454 U.S. 263 (1981) 13, 17

Wolin v. Port of New York Authority, 392 F.2d 83 (2d Cir. 1968) 7

Wright v. Chief of Transit Police, 558 F.2d 67 (2d Cir. 1977) 7

STATUTES AND ORDINANCES CITED:

Article XXIV, Section 238.8 of the Los Angeles City Charter 2, 3, 11

49 U.S.C. § 1359 8

45 Fed. Reg. 35 (1980) 8

No. 86-104

In The

Supreme Court of the United States

October Term, 1985

THE BOARD OF AIRPORT COMMISSIONERS OF THE CITY OF LOS ANGELES, *ET AL.*,

Petitioners,

vs.

JEWS FOR JESUS, INC.
AND ALAN HOWARD SNYDER,
a/k/a AVI SNYDER,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION FOR THE RESPONDENTS

PART ONE

STATEMENT OF THE CASE

Respondents are Jews for Jesus, Inc.[1], a non-profit religious corporation, and Alan Howard Snyder, a minis-

[1] Jews for Jesus, Inc., is a California non-profit religious corporation with no parent companies and no subsidiaries. Jewish Christian Ministry of Reconciliation and A Messianic Jewish Perspective are affiliates of Jews for Jesus, Inc.

ter of the Gospel employed with Jews for Jesus, Inc. The Petitioners are the City of Los Angeles and the Board of Airport Commissioners of the City of Los Angeles ("Board"), as individuals and as operators of Los Angeles International Airport ("LAX"). Pursuant to City of Los Angeles Charter Article XXIV, Section 238.4, the Board manages and controls all airports owned by the City of Los Angeles including LAX.

On July 13, 1983, the Petitioners enacted Resolution No. 13787. This resolution on its face bans without restriction all "First Amendment activities" from the interior terminal areas at LAX which are otherwise open to the public, including the pedestrian walkways located within those terminals.

On July 6, 1984, Snyder was distributing free religious literature on a pedestrian walkway in the Central Terminal Area ("CTA") at LAX. In distributing the religious literature, Snyder was not blocking any entrances, exits, stairways, escalators, elevators, doors, or otherwise inhibiting the free flow of pedestrian traffic on the pedestrian walkway located inside the terminal. He was not touching, annoying, blocking, obstructing, or otherwise harassing any other person present in the immediate vicinity of his location on the pedestrian walkway. Nevertheless, he was approached by a Department of Airports peace officer. The officer showed Snyder a copy of the Resolution, told Snyder that he was violating it, and asked him to leave. The officer warned Snyder that if he refused to leave, the city would take legal action against him. Snyder stopped distributing the leaflets and immediately left the airport terminal as the officer had demanded.

On July 17, 1984, Jews for Jesus, Inc. filed suit in the United States District Court for the Central District of California seeking a declaration of its rights to distribute religious literature in public areas in the CTA. Jews for Jesus, Inc. challenged the constitutionality of the Resolution under both the United States and California Constitutions.

The matter came before the district court for trial on January 6, 1985. Counsel for all parties orally stipulated to the facts and the district court treated the trial briefs as cross-motions for summary judgment without objection from the parties. The district court ruled that the CTA is a traditional public forum and declared the total ban on First Amendment activities unconstitutional on its face.

The Petitioners appealed to the United States Court of Appeals for the Ninth Circuit, which held that the CTA at LAX is a traditional public forum and that governmental interests advanced by the Petitioners were not sufficiently compelling to justify the total exclusion of persons wishing to exercise free speech within the CTA.

Article XXIV, Section 238.8 of the Los Angeles City Charter provides in part:

> The Board shall likewise have power to enter into leases with any person, firm or corporation for purposes other than for the promotion and accommodation of air commerce and air navigation covering any portion of the airport property whenever the Board shall determine that the use of such portion of the airport property is not necessary for the promotion and accommodation of air commerce and air navigation or use incidental thereto.

The terminal facilities at LAX contain large areas open to the public, including the pedestrian walkways, ticketing and baggage claim areas, baggage lockers, check-in gates, loading gates, cocktail lounges, waiting areas, aircraft loading gates, restaurants, news stands, gift shops, barber shops, art displays, information displays, flight insurance counters, rent-a-car counters, hotel, motel, restaurant, and ground transportation advertising displays, rest areas, including chairs and benches, restrooms, automatic traveler's check and banking machines, and general waiting areas. The public is permitted unrestricted access to these portions of the airport terminal interiors.

LAX is the third busiest airport in the world. It handled more than 32 million passengers in 1982, more than 33 million passengers in 1983, and it was anticipated that it would handle more than 34 million passengers in 1984. It is estimated that at least an equal number of greeters enter the terminal area to pick up or drop off airline passengers.

During at least the past ten years, a variety of religious and political groups, including the Respondents, have ultilized the interior area of terminals at LAX, including the pedestrian walkways located within it, to distribute literature and communicate ideas.

The Petitioners have expressly allowed the exercise of commercial speech in the interior terminal areas, including areas directly attached to or in the vicinity of the pedestrian walkways located within it. Art work created by children and depicting airport scenes has been displayed in the terminal facilities with the Petitioners knowledge and permission. The Petitioners expressly per-

mitted a display entitled "Think Before You Buy," which contained specimens, pictures, and information pertaining to protected species, to be maintained inside terminal facilities. The Petitioners also license the operation of a Christian Science reading room, which is open to the public, inside terminal facilities. Petitioners do not prohibit persons wearing T-shirts or other articles of clothing imprinted with slogans, statements, or other forms of religious or political communication from walking in the interior terminal areas of LAX. During the 1984 summer Olympic Games in Los Angeles, free-standing "Olympic Family" information booths were set up within the terminal areas at LAX with Petitioners' express consent. A picture of the Mayor of the City of Los Angeles is displayed in each of the terminals at LAX on a sign that states "Mayor Tom Bradley Salutes the New LAX Gateway to the Olympics."

Recent expansion of the existing terminals and construction of new terminals has reduced the levels of pedestrian congestion inside the terminal complexes.

The express policy of Jews for Jesus, Inc., prohibits its members from either soliciting or accepting any money while distributing religious literature in the terminals at LAX. Jews for Jesus, Inc., also forbids its members, while engaged in the free distribution of religious literature, from harassing, interfering with, blocking, obstructing, physically touching or otherwise intentionally annoying any other person.

PART TWO

REASONS WHY THE PETITION SHOULD BE DENIED

1. The United States Court of Appeals for the Ninth Circuit correctly held that the Central Terminal Area of the Los Angeles International Airport, which has been opened to unrestricted public access, is a traditional public forum.

The United States Court of Appeals for the Ninth Circuit correctly concluded that the Central Terminal Area of the Los Angeles International Airport is a traditional public forum and that Petitioners had advanced no sufficiently compelling interests to justify the total prohibition of First Amendment activity. The Ninth Circuit's decision in this case is not in conflict with any decision of this Court or of any other court. Every court of appeals and district court which has been confronted with the question has held that an airport terminal is a public forum. *See United States Southwest Africa/Nambia Trade & Cultural Council v. United States*, 708 F.2d 760 (D.C. Cir. 1983); *Fernandes v. Limmer*, 663 F.2d 619 (5th Cir. 1981), *cert. dismissed*, 458 U.S. 1124 (1982); *Rosen v. Port of Portland*, 641 F.2d 1243 (9th Cir. 1981); *International Society for Krishna Conscioussness, Inc. v. Rochford*, 585 F.2d 263 (7th Cir. 1978); *Chicago Area Military Project v. City of Chicago*, 508 F.2d 921 (7th Cir. 1975), *cert. denied*, 421 U.S. 992 (1975); *International Society for Krishna Consciousness, Inc. v. Wolke*, 453 F.Supp. 869 (E.D. Wis. 1978); *International Society for Krishna Consciousness, Inc. v. Engelhardt*, 425 F.Supp. 176 (W.D. Mo. 1977); *see also International Society for Krishna Consciousness of Atlanta v. Eaves*, 601 F.2d 809 (5th Cir. 1979); *Kuszynski v. City of Oakland*, 479 F.2d 1130 (9th Cir. 1973); *International So-*

ciety for Krishna Consciousness, Inc. v. Lentini, 461 F.Supp. 49 (E.D. La. 1978); *International Society for Krishna Consciousness, Inc. v. Collins*, 452 F.Supp. 1007, *vacated*, 609 F.2d 151 (5th Cir. 1980) (S.D. Tex. 1977); *cf. Gannett Satellite Information Network, Inc. v. Metropolitan Transportation Authority*, 745 F.2d 767 (2d Cir. 1984) (train station is appropriate forum for newsrack newspaper sales); *Wright v. Chief of Transit Police*, 558 F.2d 67 (2d Cir. 1977)(government must prove existence of compelling state interest to justify total ban on sale of newspapers by hand in subway system); *Wolin v. Port of New York Authority*, 392 F.2d 83 (2d Cir. 1968), *cert. denied*, 393 U.S. 940 (1968) (bus terminal is a public forum); *Penthouse International v. Koch*, 599 F.Supp. 1338 (S.D.N.Y. 1984) (subway stations are public forums); *Moskowitz v. Cullman*, 432 F.Supp. 1263 (D.N.J. 1977) (a bus and train terminal is a public forum). In reaching its decision the Ninth Circuit relied upon cases from other circuits that had held airport terminals to be public forums. *Jews for Jesus, Inc. v. Board of Airport Commissioners*, 785 F.2d 791, 794-95 (9th Cir. 1986). These other circuits held that airport terminals were public forums by analogizing them to streets, sidewalks and parks.

In *United States Southwest Africa/Nambia Trade & Cultural Council v. United States*, 708 F.2d 760 (D.C. Cir. 1983) the court held that the public places of Washington National Airport and Dulles International Airport were public forums. It noted that, "[a]lthough not every form of speech is necessarily consistent with the airport's primary use, it seems clear that the public places in these airports are far more akin to such public forums as streets and common areas than they are to such nonforums as

prisons, buses, and military bases." 708 F.2d at 764. The court also pointed out that Congress had ordered the FAA to promulgate rules regulating access to public areas at Washington National Airport and Dulles International Airport for individuals and organizations desiring to solicit funds or distribute written material. 708 F.2d 765 (citing 49 U.S.C. § 1359 (Supp.V.1981)). The FAA has observed that

> [t]here is a considerable amount of social and commercial interchange in the terminals and, in many respects, the terminals are like any other public thoroughfare where there is no question that constitutional guarantees of freedom of speech, the exercise of religion and the right to peaceable assembly apply. These activities enjoy the protection of the First Amendment, and they may not be regulated by airport authorities in the same manner as commercial activity.

708 F.2d at 765 (citing 45 Fed. Reg. 35, 314 (1980)).

The court concluded that, "[w]hatever common sense differences may exist in the forms of free speech allowable in airports, as opposed to parks and streets, an unusual consensus of judicial, legislative, and administrative opinion would classify the public areas of National and Dulles squarely within the public forum family." 708 F.2d at 766.

In *Fernandes v. Limmer*, 663 F.2d 619, 629 (5th Cir. 1981), the Fifth Circuit concluded that in view of the lack of restrictions on entry by the general public, and the commercial, street-like character of the terminal concourses, the terminal buildings at the Dallas-Fort Worth airport complex must be treated as a public forum. The court observed that, "[i]t is now generally well established that airport terminals owned and administered by governmental entities are public forums in which efforts to regulate

speech or religious activity must comport with First Amendment guarantees." 663 F.2d at 626 (citing *International Society for Krishna Consciousness of Atlanta v. Eaves*, 601 F.2d 809 (5th Cir. 1979); *International Society for Krishna Consciousness v. Rochford*, 585 F.2d 263 (7th Cir. 1978); *Chicago Area Military Project v. City of Chicago*, 508 F.2d 921 (7th Cir. 1975); *Kuszynski v. City of Oakland*, 479 F.2d 1130 (9th Cir. 1973)). The court recognized the similarity between public streets and the terminal buildings "where air travelers as well as the general public may shop, dine, and sightsee." 663 F.2d at 627. Although recognizing that governmental ownership did not guarantee the public absolute and unrestricted access for the purpose of exercising First Amendment liberties, the court concluded that the interior terminal is at least partly a public forum. *Id.* at 626, 627.

The Seventh Circuit Court of Appeals, in *Chicago Area Military Project v. City of Chicago*, 508 F.2d 921 (7th Cir. 1975), held that the Chicago Area Military Project was entitled to exercise rights to free speech and press within the terminal buildings of the O'Hare Airport. The court pointed out that the plaintiffs were not seeking "to distribute leaflets on airplanes or in other privately owned or leased places but only in the spacious, city-owned common areas which resemble those public thoroughfares which have been long recognized to be particularly appropriate places for the exercise of constitutionally protected rights to communicate ideas and information." 508 F.2d at 925 (citing *Hague v. CIO*, 307 U.S. 496, 515, 516 (1939)). In that case, the fact that great numbers of people were freely admitted to public areas of the terminal buildings for shopping, dining, sightseeing, or to satisfy their curiosity was material. 508 F.2d at 925. The

court held that the plaintiffs were entitled to leafletting in the public areas of the terminal buildings while noting that not all publicly owned facilities were available for every expression of free speech. *Id.*

Even though the Ninth Circuit relied on these recent circuit court cases in reaching its decision, the Petitioners erroneously argue that its decision was based on inappropriate, inapplicable or out-dated case law. The Petitioners contend that the "airport cases" neither support the decision nor the conclusion that the terminal facilities are public forums. The cases relied upon by the Ninth Circuit, however, are clearly apposite and properly conclude that airport terminals are traditional public forums. Contrary to Petitioners' contentions, the applicable case law on both the appellate and trial court levels is harmonious and fully consonant with the Ninth Circuit's decision.

The Petitioners also argue that the Ninth Circuit chose to ignore the principles that publicly owned property is not a public forum and that public access does not make a facility a public forum. The Ninth Circuit, however, noted that "[i]f the speech is protected the court must identify the nature of the forum, because the extent to which the government may limit access depends on whether the forum is public or nonpublic." *Jews for Jesus, Inc.*, 785 F.2d 791, 793 (1986) (citing *Cornelius v. NAACP Legal Defense Educational Fund, Inc.*, 105 S.Ct. 3439, 3446-47 (1985)). The parties stipulated that the airport terminals were publicly owned and that the public was entitled to unlimited access to the interior terminals. If the court had ignored the foregoing principles, as Petitioner suggests, the public forum analysis would not have been necessary upon recognition of these stipulated facts.

However, the court did not ignore these principles but conducted a public forum analysis relying on other circuits and analogizing airport terminals to other traditional public forums.

The gravamen of Petitioners argument is based on the assertion that the airport facilities are dedicated and intended to be used exclusively for airport-related purposes. The Ninth Circuit properly rejected this noting that

> [t]he Board's reliance on recent Supreme Court decisions in *Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983), and *Cornelius*, 105 S.Ct. 3439 is misplaced. These cases do not concern the determination of traditional public forums. They address a separate and distinct issue whether governmental facilities that *are* not traditional public forums have been *opened* for First Amendment activities. *See Perry Education Association*, 460 U.S. at 46, 103 S.Ct. at 955 (interschool mail system is not a traditional public forum); *Cornelius*, 105 S.Ct. at 3450 (the Combined Federal Public Campaign literature is not a traditional public forum).

Jews for Jesus, Inc., 785 F.2d 791, 793 (9th Cir. 1986).

The Petitioners argue that the city charter mandates that the airport facilities be used only for their intended and dedicated airport-related purposes. Article XXIV, Section 238.8 of the charter also provides, however, that the Board shall "have power to enter into leases with any person, firm or corporation for purposes other than for the promotion and accommodation of air commerce and air navigation covering any portion of the airport property. . . ."

The Petitioners repeatedly assert that the terminal facilities are designed for and dedicated to airport-related purposes and that it is their intent to limit their uses to those purposes alone. However, this is not dispositive of the public forum issue nor relevant in determining whether a facility is a traditional public forum. Petitioners seem to suggest that traditional public forums are limited to streets, parks and sidewalks regardless of the similarities other forums may have to these long-recognized traditional public forums. A government, however, cannot create a public facility which has been traditionally held open to the exercise of free speech and then close that forum to free speech simply by intending that it have some other principal purpose. *See United States v. Grace*, 461 U.S. 171, 180 (1983). Streets are intended for ground-related traffic in the same manner that airport terminals are intended for airport-related purposes and, just as streets are traditional public forums, so are airport terminals.

The pedestrian walkways inside the airport terminals do not differ materially from the sidewalks that boarder streets. The fact that the pedestrian walkways are in proximity to airport runways and other areas that are inappropriate for the exercise of free speech does not make those walkways any less a public forum. *See United States v. Grace*, 461 U.S. 171 (1983). Likewise, the fact that the airport terminal is a covered facility while streets and sidewalks are open does not affect the appropriateness of the terminal for the exercise of free speech.

2. Petitioners have opened the Central Terminal Area of the Los Angeles International Airport to the public for expressive activity.

The Petitioners have opened the Central Terminal Area of the Los Angeles International Airport to expressive activities by permitting the exercise of certain First Amendment activity within it. A public facility not dedicated traditionally to expressive activity can become a public forum when free speech access is granted to the public by the governmental authority. *See Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37 (1983); *Heffron v. International Society for Krishna Consciousness*, 452 U.S. 640 (1981); *Widmar v. Vincent*, 454 U.S. 263 (1981).

In *Widmar*, this Court held that the University of Missouri had created a public forum by making its facilities generally available for the activities of registered student groups. 454 U.S. at 268. The university had argued that "[a]lthough the University had routinely approved Cornerstone meetings before 1977, . . . University officials had never 'authorized a student organization to utilize a University facility for a meeting where they had full knowledge that the purposes of the meeting include[d] religious worship or religious teaching.'" *Id.* at 266, n.3. The Petitioners have advanced the same argument in the instant case which this Court rejected in *Widmar*.

In *Cornelius v. NAACP Legal Defense & Educational Fund, Inc.*, 105 S.Ct. 3439 (1985), this Court observed that it "has looked to the policy and practice of the government to ascertain whether it intended to designate a place not traditionally open to assembly and debate as a pub-

lic forum." 105 S.Ct. at 3449 (citing *Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37, 47 (1983)). The stipulated facts show that during at least the past ten years a variety of religious and political groups, including the Respondents, have utilized the terminals to distribute literature and communicate ideas. Art work created by children has been displayed with Petitioners' express knowledge and permission. A display pertaining to protected species has been constructed and maintained inside terminal facilities, again with Petitioners' express permission. A picture of the mayor is displayed in each of the terminals. Petitioners do not prohibit persons wearing T-shirts or other clothing with slogans or other forms of religious or political communication from walking in the interior terminals. The Petitioners expressly consented to an information booth being maintained inside the terminal during the 1984 summer Olympic Games. The Petitioners permit the operation of a Christian Science reading room. Despite these numerous instances in which they have expressly consented to First Amendment activities, Petitioners argue that they have not made the facilities available for use by the public for expressive activity. This argument finds no support in the stipulated facts and should accordingly be rejected.

3. Petitioners have failed to show that an absolute prohibition of First Amendment activities is reasonable.

Even assuming that the Central Terminal Area of the Los Angeles International Airport is not a traditional public forum, any regulation imposed upon speech must be reasonable and not an effort to suppress particular speech. *See Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37 (1983). Whether a restric-

tion of access to a non-public forum is reasonable must be assessed in view of the purpose of the forum and all surrounding circumstances. *Cornelius v. NAACP Legal Defense & Educational Fund, Inc.* 105 S.Ct. 3439 (1985). Petitioners have not shown how the exercise of First Amendment activity will in any way interfere with the airport-related purpose. Although arguing that the terminal is intended and designated for airport-related purposes, Petitioners fail to demonstrate a single problem that might result from the exercise of First Amendment activities.

The form of expression in this case differs from that in *Members of City Council v. Taxpayers For Vincent*, 466 U.S. 789 (1984) and in *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981). In *Members of City Council v. Taxpayers for Vincent*, this Court recognized that "the esthetic interest in preventing the kind of litter that may result from the distribution of leaflets on the public streets and sidewalks cannot support a prophylactic prohibition against the citizens' exercise of that method of expressing his views." 466 U.S. 789 at —. This interest, however, was held sufficient to support a prohibition on posting signs. *Id.* at —. The Court thus distinguished the expressive activity of distributing leaflets from the posting of signs and held that while the former may be constitutionally protected the latter was not. *Id.* at —.

In *Heffron*, Justice Blackmun noted that "commonsense differences between literature distribution, on the one hand, and solicitation and sales, on the other, suggest that the latter activities present greater crowd control problems than the former." 452 U.S. at 665 (Blackmun, J., concurring in part and dissenting in part). In the in-

stant case, Snyder was not soliciting money. Furthermore, it is the express policy of Jews for Jesus, Inc., that its members must neither solicit nor accept any money while distributing religious literature in the terminals at LAX. The Resolution in the instant case, however, makes no distinction between different forms of expressive activity but instead unreasonably prohibits all "First Amendment activities".

The undisputed facts reflect that Snyder, in distributing religious literature, was not blocking any entrance, exit, stairway, escalator, elevator, door or otherwise inhibiting the free flow of pedestrian traffic on the pedestrian walkway. He was not touching, annoying, blocking, obstructing, or otherwise harrassing any person present in the immediate vicinity. Furthermore, during at least the past ten years, a variety of religious and political groups, including the Respondents, have utilized the interior of the terminal to distribute literature and communicate ideas. These facts show that the exercise of First Amendment activity attempted here is clearly compatible with airport-related functions and neither impairs nor impedes them.

The Petitioners have expressly allowed the exercise of commercial speech in the interior terminals contending that such speech is of interest to the traveling public. Art work created by children and an exhibit pertaining to protected species have been displayed in the terminal with Petitioners' express permission. Any perceived distinction between these permitted activities and the religious speech engaged in by Snyder is illusory and is certainly not a reasonable basis for denying religious groups the

opportunity to distribute their materials in the interior terminals which are open to unrestricted public access.

In *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, — (1984), this Court held that "[t]o create an exception for [certain] speech and not . . . other types of speech might create a risk of engaging in constitutionally forbidden content discrimination." In the instant case, the Petitioners have created exceptions for certain speech while unreasonably forbidding Respondents' speech and have thereby regulated speech on the basis of its content. In allowing the expression of religious ideas by permitting the operation of a Christian Science reading room, Petitioners have placed themselves in the untenable position of simultaneously arguing that Respondents' message is not airport-related while the religious expressions of the Christian Science Church are. Aside from being obviously incongruous, Petitioners' actions are content discriminatory and thereby constitutionally impermissible. By licensing the Christian Science Church to promulgate its religious views while prohibiting Jews for Jesus, Inc., from evangelizing, Petitioners assume the role of censors determining what kinds of literature may be distributed and who may distribute it. This Court has historically recognized the dangers inherent in censorship, *see Schneider v. State*, 308 U.S. 147, 163-64 (1939); *Cantwell v. Connecticut*, 310 U.S. 296, 305 (1940), and has required the highest scrutiny of situations in which a governing authority undertakes to regulate speech on the basis of its content. *See Widmar v. Vincent*, 454 U.S. 263, 276 (1981). Even time, place and manner restrictions cannot be based upon the content or subject matter of speech. *Heffron*

v. International Society for Krishna Consciousness, Inc., 452 U.S. 640, 647 (1981).

The Board's Resolution moreover suffers from overbreadth since it presents a realistic danger of significantly compromising recognized First Amendment protections of individuals not before this Court. *See Members of City Council v. Taxpayer for Vincent*, 466 U.S. 789 (1984). Specifically, the Resolution applies not only to the distribution of leaflets but to all "First Amendment activity". This Court noted that the ordinance in *Heffron* permitted individuals to "mingle with the crowd and orally propagate their views." 452 U.S. at 655. The Resolution in this case would on its face prohibit that type of expressive activity since it outlaws all "First Amendment activity" whatsoever. Even if it were reasonable to prohibit Respondents from distributing leaflets, it is certainly unreasonable to limit all expressive activity.

———o———

CONCLUSION

This Court should refuse to grant a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit since it is manifest that the decision sought to be reviewed is demonstrably in accord with the applicable decisions of this Court and of all federal appellate and trial courts which have addressed the issues presented.

Respectfully submitted,

ANDREW J. EKONOMOU
515 Rhodes-Haverty Building
134 Peachtree Street, N.W.
Atlanta, Georgia 30303
(404) 221-1000
Counsel for Respondents

OF COUNSEL:
JAY ALAN SEKULOW
The Standard Building
92 Luckie Street, N.W.
Atlanta, Georgia 30303
(404) 522-7185

Supreme Court, U.S.
FILED
NOV 20 1986
JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 86-104

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1985

THE BOARD OF AIRPORT COMMISSIONERS
OF THE CITY OF LOS ANGELES, et al.,
Petitioners,

VS.

JEWS FOR JESUS, INC., and ALAN HOWARD SNYDER,
a.k.a. AVI SNYDER,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOINT APPENDIX

JAMES K. HAHN, City Attorney
JAMES H. PEARSON, Senior
Assistant City Attorney
JAMES R. KAPEL,*
Assistant City Attorney
#1 World Way
Los Angeles, CA 90009
(213) 646-3260
Attorneys for Petitioners
* *Counsel of Record*

ANDREW J. EKONOMOU*
515 Rhodes Haverty
Building
134 Peachtree Street,
N.W.
Atlanta, Georgia 30303
(404) 221-1000
Attorney for
Respondents
Of Counsel:
JAY ALAN SEKULOW
60 Haight Street
San Francisco, CA 94102
(415) 864-2600
**Counsel of Record*

Petition For Certiorari Filed July 21, 1986
Certiorari Granted October 6, 1986

Bowne of Los Angeles, Inc., Law Printers (213) BOWNE CO

30 pp
$
Soldout

TABLE OF CONTENTS

	Page
Relevant Docket Entries from the District Court and the Court of Appeals	iii
Board of Airport Commissioners Resolution No. 13787	1a
Stipulation of Facts	7a
Stipulation Re Use of Photographic Exhibits from District Court Transcript	22a
Exhibit List for Trial	23a
Photographic Exhibits	24a

The following opinions, decisions, and judgments have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the printed Petition for Certiorari:

Opinion of the United States District Court for the Central District of California entered March 29, 1985 ..... B1

Opinion of the United States Court of Appeals for the Ninth Circuit filed March 25, 1986 ..... A1

RELEVANT DOCKET ENTRIES
DISTRICT COURT

. . .-17-84 — sh

1. Cmplnt. Issd sumns. Case may be referred to Mag Geffen for discvry.

8-14-84 — wh

4. Deft's ANS TO COMPLT; & CNTRCLAIM fr decl-try & injnctv relief

. . .-10-84 — wh

7. ANS TO CNTRCLAIM pltf

1-8-85 — wh

15. MO: Exh #90 receivd into evid; Crt prties stip tht exhs 2-89 be receivd into evid undr submission

. . .-26-85 — sb

16. Memo decision & Judgmnt in fr pltf (ENT 3-29-85) MD JS 6 Mld cpy & Notc

. . .-23-85 — avm

17. Deft's NOTC OF APPEAL to 9th Cir. C/A frm jdmt ent 3/29/85. $70.00 flng & doc fee pd.

. . .-2-85 — vu

18. Fld trans designation & ordering form.

LIST OF COURT OF APPEALS ENTRIES

1-17-86 Case argued
3-25-86 Court of Appeals Opinion Filed

APPENDIX A

RESOLUTION NO. 13787

WHEREAS, pursuant to City of Los Angeles Charter Section 238.4, the Board of Airport Commissioners shall have possession, management, charge, superintendence and control of all airports, airport sites, and all equipment, accommodations and facilities for aerial navigation, flight, instruction and commerce belonging to or pertaining to this city; and

WHEREAS, pursuant to Charter Section 238.5, the Board shall fix, regulate and collect rates or charges for the use of all buildings, grounds, facilities, utilities and structures which are owned, controlled or operated by the city in connection with or for the promotion or accommodation of air commerce and air navigation; and for services in connection therewith; and

WHEREAS, pursuant to Charter Section 238.8, the Board shall have the power to grant franchises, permits and licenses to and to enter into leases with any person, firm or corporation, or agency of the government for the use of any municipally owned or controlled airport or any part of facility thereof, for the promotion and accommodation of air commerce and air navigation or use incidental thereto; and

WHEREAS, also pursuant to Section 238.8 of the City Charter, the Board shall have the power to enter into leases for purposes other than for the promotion and accommodation of air commerce and air navigation covering any portion of the airport property whenever the Board shall determine that the use of such portion of the airport property in not necessary for the promotion and accommodation of air commerce and air navigation or uses incidental thereto; and

WHEREAS, the Board considers the Central Terminal Area, which for purposes of this Resolution consists of the ticketing and satellite facilities and the parking structures and areas and streets, roadways and bridges adjacent thereto at Los Angeles International Airport to be vital facilities for the promotion and accommodation of air commerce and air navigation and uses incidental thereto; and

WHEREAS, the existing Central Terminal Area at Los Angeles International Airport currently accommodates and processes approximately 34 million annual passengers and an equal number of meeters and greeters; and

WHEREAS, the Board of Airport Commissioners is currently engaged in an expansion program of Central Terminal Area at Los Angeles International Airport due to the extreme congestion in the Central Terminal Area; and

WHEREAS, the projected growth of air passenger traffic at Los Angeles International Airport is anticipated to reach a level of 40 million annual passengers by the year 1986; and

WHEREAS, the primary purpose of expanding the Central Terminal Area at Los Angeles International Airport is to accommodate more efficiently the traveling public at Los Angeles International Airport and to enhance the promotion and accommodation of air commerce and air navigation or uses incidental thereto; and

WHEREAS, even with the expanded Central Terminal Area at Los Angeles International Airport said facilities will continue to experience high periods of passenger traffic and congestion; and

WHEREAS, it is the objective of the Board of Airport Commissioners to keep the Central Terminal Area as free as possible from congestion and obstructions as an aid to

the traveling public and in the promotion of air commerce and air navigation and uses incidental thereto; and

WHEREAS, in recognition of its Charter duty to accommodate and promote air commerce and air navigation and uses incidental thereto, the Board of Airport Commissioners determines that due to the vital nature of the Central Terminal Area, no portion thereof should be utilized for a purpose not connected with the promotion and accommodation of air commerce and air navigation and uses incidental thereto; and

WHEREAS, over the past several years, various individuals and/or entities have attempted to engage in First Amendment activities within the Central Terminal Area; and

WHEREAS, said individuals and/or entities engaging in such First Amendment activities have significantly interfered with the free flow of passenger traffic in the Central Terminal Area at Los Angeles International Airport and substantially contributed to the congestion in said Central Terminal Area; and

WHEREAS, such interference with passenger traffic and congestion caused by First Amendment activities in the Central Terminal Area are counterproductive to the objectives of the Board in accommodating air commerce and air navigation or uses incidental thereto; and

WHEREAS, engaging in First Amendment activities in the Central Terminal Area at Los Angeles International Airport is incompatible with the character and function of said Central Terminal Area; and

WHEREAS, the Board of Airport Commissioners does not issue permits at Los Angeles International Airport to individuals and/or entities to engage in First Amendment activities within the Central Terminal Area at Los Angeles International Airport; and

WHEREAS, over the years, the various individuals and/or entities which have engaged in First Amendment activities within the Central Terminal Area at Los Angeles International Airport have done so without the consent or approval of the Board of Airport Commissioners; and

WHEREAS, extensive litigation involving various city ordinances and state statutes has not resolved the issue of whether the Central Terminal Area at Los Angeles International Airport constitutes an area which is open for the conduct of First Amendment activities; and

WHEREAS, the Board of Airport Commissioners, irrespective of the extensive litigation involving First Amendment activities at Los Angeles International Airport, has never opened the Central Terminal Area at Los Angeles International Airport to First Amendment activities; and

WHEREAS, in the prudent management of Los Angeles International Airport and in order to avoid congestion and interference with the promotion and accommodation of air commerce and air navigation and uses incidental thereto and in order to protect passengers in the Central Terminal Area from unwanted or disruptive intrusions, the Board of Airport Commissioners herein determines that the Central Terminal Area at Los Angeles International Airport is not open to individuals or entities engaging in First Amendment activities; and

WHEREAS, if any entity and/or individual seeks to engage in First Amendment activities in the vicinity of the Central Terminal Area, those activities must be conducted only on the sidewalks in front of the ticketing buildings and in such a manner so as not to interfere with other persons; and

NOW, THEREFORE, BE IT RESOLVED by the Board of Airport Commissioners that the Central Termi-

nal Area at Los Angeles International Airport is not open for First Amendment activities by any individual and/or entity;

BE IT FURTHER RESOLVED that the Central Terminal Area at Los Angeles International Airport is only to be used for the promotion and accommodation of air commerce and air navigation or uses incidental thereto unless the Board of Airport Commissioners makes the appropriate findings pursuant to Charter Section 238.8 that a portion of said area is not currently required for the promotion or accommodation of air navigation or uses incidental thereto; and

BE IT FURTHER RESOLVED that after the effective date of this Resolution, if any individual and/or entity seeks to engage in First Amendment activities within the Central Terminal Area at Los Angeles International Airport, said individual and/or entity shall be deemed to be acting in contravention of the stated policy of the Board of Airport Commissioners in reference to the uses permitted within the Central Terminal Area at Los Angeles International Airport; and

BE IT FURTHER RESOLVED that if any individual or entity engages in First Amendment activities within the Central Terminal Area at Los Angeles International Airport, the City Attorney of the City of Los Angeles is directed to institute appropriate litigation against such individual and/or entity to ensure compliance with this Policy statement of the Board of Airport Commissioners; and

BE IT FURTHER RESOLVED if any entity or individual seeks to engage in First Amendment activities in the vicinity of the Central Terminal Area, those activities must be conducted only on the sidewalks in front of the

ticketing buildings and in such a manner so as to not interfere with other persons; and

BE IT FURTHER RESOLVED that Department management is directed to monitor the conduct of any First Amendment activities on the sidewalks in front of the ticketing buildings and report periodically to the Board regarding such activities in order for the Board to ascertain whether any restrictions should be implemented concerning said activities; and

BE IT FURTHER RESOLVED that this action, a general policy procedure, is exempt from the requirements of the California Environmental Quality Act as provided by Article III, Section 2.n. of the Los Angeles City CEQA Guidelines.

I hereby certify that the foregoing is a true and correct copy of Resolution No. 13787 adopted by the Board of Airport Commissioners at a special meeting held Wednesday, July 13, 1983.

ELAINE E. STANIEC — Secretary
BOARD OF AIRPORT
COMMISSIONERS

STIPULATION OF FACTS

1. The City of Los Angeles ("City") is a municipal corporation and is the owner of the real property and facilities commonly known as Los Angeles International Airport (hereinafter "LAX").

2. The Board of Airport Commissioners of the City of Los Angeles (hereinafter "Board" is charged by the Los Angeles City Charter with the management and control of the Los Angeles Department of Airports (hereinafter "Department").

3. The Department is a department of the City and operates LAX under the direction and control of the Board.

4. The LAX complex encompasses approximately 3500 acres consisting of three general areas: (A) the restricted or "field side" area containing runways, taxiways, airline maintenance and cargo facilities, aircraft loading ramps, and various aircraft service facilities; (B) Airport-owned property surrounding the restricted area; and (C) the Central Terminal Area (hereinafter "CTA") which contains the terminal facilities (ticketing counter, baggage claim, waiting and loading gates), parking structures, and a series of private streets and roadways which provide vehicular access of the CTA. There are presently eight (8) terminal buildings open to the public for Airport use at LAX. Each of these eight (8) terminal facilities contain large areas open to the public, including the pedestrian walkways, ticketing and baggage claim areas, baggage lockers, check-in gates, loading gates, cocktail lounges, waiting areas, aircraft loading gates, restaurants, newsstands, gift shops, barber shops, art displays (see paragraph 28), information displays, flight insurance counters, rent-a-car counters, hotel, motel, restaurant and ground transportation advertising displays,

rest areas, including chairs and benches, restrooms, automatic travellers check and banking machines and general waiting areas. Most of these terminal facilities have offices for Airport tenants which are generally not open to the public.

5. The public is permitted unrestricted access to the portions of the airport terminal interiors identified in Paragraph 4(C), above.

6. As a part of the expansion program at LAX, a second level roadway system has been constructed which essentially duplicated the existing roadway system by creating an upper level, or second level, roadway system above the surface roads. This second level roadway system was designed to alleviate, at least in part, the vehicular and pedestrian congestion at LAX.

7. As a part of the expansion program, each of the terminal facilities was expanded (or is presently being expanded) to provide access to those facilities from the upper level roadway. Thus, a passenger departing from LAX generally arrives on the upper level roadway, enters the terminal facility and proceeds after any necessary ticketing and baggage check-in to the waiting areas and terminal gates. A passenger arriving at LAX by air disembarks from the aircraft and proceeds, at least in most terminals, on a lower level tunnel to the baggage claim area and then out of the terminal on the sidewalk and to any required ground transportation.

8. The planned expansion and construction project at LAX has recently been substantially completed. This expansion of existing terminals and construction of new terminals at LAX has had the effect of reducing the levels of pedestrian and vehicular congestion both inside and outside of the terminal complexes to levels below those

which existed prior to the commencement of the expansion and construction project.

9. In front of the terminal facilities on both levels of the roadway are sidewalks which extend approximately twelve (12) to sixteen (16) feet from the terminal entrance.

10. LAX is the third busiest airport in the world. LAX handled more than 32 million passengers in 1982, more than 33 million passengers in 1983, and it is anticipated will handle more than 34 million passengers in 1984. It is estimated that at least an equal number of "meeters and greeters" enter the CTA to pick up or drop off airline passengers.

11. LAX is the largest destinational airport in the world with the largest number of enplaning and deplaning passengers.

12. Approximately 75 percent of the passengers who use LAX commence or terminate their flight travel at LAX.

13. Approximately 25 percent of the passengers who use LAX do not commence or terminate their flight travel at LAX.

14. Because approximately 75 percent of the passengers either commence or terminate their flight travel at LAX, at least 75 percent of the passengers must use the sidewalk area in front of the terminal facilities.

15. Because approximately 25 percent of the passengers do not either commence or terminate their flight travel at LAX, at least 25 percent of the passengers do not use the sidewalk area in front of the terminal facilities.

16. Article XXIV, section 238.8 of the Los Angeles City Charter provides as follows:

The Board shall have power to grant franchises, permits and licenses to, and to enter into leases with, any person, firm or corporation, or agency of the government for the use of any municipally owned or controlled airport or any part of facility thereof, for the promotion and accommodation of air commerce and air navigation, or use incidental thereto, together with the right to use said airport in common with others as necessary to the right granted. (Amended, 1951.)

The Board shall likewise have power to enter into leases with any person, firm or corporation for purposes other than for the promotion and accommodation of air commerce and air navigation covering any portion of the airport property whenever the Board shall determine that the use of such portion of the Airport property is not necessary for the promotion and accommodation of air commerce and air navigation or use incidental thereto.

17. Article XXIV, section 239.5 of the Los Angeles Charter provides as follows:

Whenever it shall be determined by the Board by order that certain parts of any airport owned, operated or controlled by the city may not be required at such time for use in connection with, or for the promotion and accommodation of air commerce and air navigation, the general manager shall have power to issue revocable permits to use limited portions of such space for any and all purposes which shall not interfere with air commerce or air navigation and not inconsistent with any trust upon which such land may be held by the City of Los Angeles. Every such permit shall first be approved by the Board and shall prescribe that it shall be revocable, without compensation to the lessee or permittee, upon due notice to

be stated therein, such notice in no case to exceed one year.

18. For the use of the terminal facilities, the Department has entered into permits, license agreements, leases, and concession agreements to provide food and beverage service, news and gift facilities, flight insurance, money exchange facilities, ground transportation, waiting areas, ticket counters, lockers, and baggage facilities.

19. The Defendants believe that the services and facilities that the Department has permitted within the terminal facilities at LAX are designed to aid the traveling public and to promote and accommodate air commerce and navigation.

20. The Department has attempted to limit the use of the terminal facilities to those uses which it believes directly aid the traveling public and thereby promote and accommodate air commerce and air navigation.

21. In the Department's opinion, it has never given a license permit or lease which allows any non-airport related commercial use of the terminal facilities.

22. During at least the past ten (10) years, a variety of religious and/or political groups have utilized the interior area of terminals at LAX, including the pedestrian walkways located therein, to distribute literature, solicit funds, and communicate ideas.

23. Defendants are or have been aware that a variety of religious and/or political groups have conducted distribution, solicitation, or communication activities at LAX without the express or implied permission of the Board or D.O.A.

24. As to the activities described in Paragraph 22 and 23, above, defendants often became aware of many of the groups engaging in those activities only after the group

had conducted its activity and had left the terminal facilities.

25. The interior of terminal areas at LAX, including the pedestrian walkways located therein, have been utilized on a number of occasions by print, television and radio media for the purpose of filming, photographing and/or interviewing public figures, such as political candidates, the Mayor of Los Angeles, and the chairman of the Los Angeles Olympic Organizing Committee. On several occasions, numerous individuals and news media personnel have gathered inside the terminal facilities at LAX to greet some of the sports teams that were returning from road games.

26. Defendants have obtained knowledge of some of the activities described in Paragraph 25 above, but often that knowledge was obtained after the event occurred.

27. A picture of the Mayor of the City of Los Angeles is displayed in each of the terminals at LAX on a sign that states "Mayor Tom Bradley Salutes the New LAX — Gateway to the Olympics."

28. Artwork created by children that depicts airport scenes has been displayed in the terminal facilities with the express knowledge and permission of the defendants.

29. A display entitled "Think Before You Buy", containing specimens, pictures, and information pertaining to protected species, has been constructed and maintained inside terminal 2 at LAX with the express knowledge and permission of defendants. The text of this display reads as follows:

> This exhibit was designed and installed by the Natural History Museum of Los Angeles County in cooperation with the Los Angeles City Attorney's Office, U.S. Fish and Wildlife Service, National Marine Fisheries Service and the Los Angeles Department

of Airports. Major assistance and funding was provided by TRAFFIC (U.S.A.) — Trade Records Analysis of Flora and Fauna in Commerce — a scientific, fact-finding program of World Wildlife Fund — U.S. monitoring the international trade in wild animals and plants.

30. A photographic display depicting photographs of various athletes was constructed and maintained inside terminal 7 at LAX for approximately two (2) to three (3) weeks in 1984 without the express knowledge and permission of defendants. The text of this display reads as follows:

> Photographs of America's Olympic Hopefuls. Sponsored by the Shooting for the Gold Foundation with a grant from Fuji Photo Film U.S.A. Inc.

31. The defendants have not restricted access by members of the general public to the interior of terminal areas at LAX to only those persons who are engaged in the use of the LAX facilities for interstate travel or for purposes of meeting or greeting airline passengers. The defendants do not attempt to restrict members of the general public from walking through the unrestricted interior of terminal areas at LAX. Defendants do not attempt to restrict members of the general public who have no purpose or desire to utilize the transportation-related facilities within the terminal areas at LAX from walking, reading, shopping, eating, drinking, and conversing with other members of the general public in the interior of terminal areas at LAX.

32. The defendants have not in the past, and do not in the present, prohibit persons wearing T-shirts or other articles of clothing imprinted with slogans, statements, or other forms of religious or political communication from walking in the interior terminal areas of LAX.

33. The defendants have expressly allowed the exercise of commercial speech in the interior of terminal areas of LAX, including areas directly attached to or in the vicinity of the pedestrian walkways located therein, in the form of advertising displays in connection with hotel, motel, restaurant, ground transportation and other services offered by commercial vendors which the defendants believe are of interest to the traveling public.

34. The expansion of LAX has been advertised on buses owned and/or operated by the Southern California Rapid Transit District and on buses owned or operated by the D.O.A. The defendants were aware of this advertising but did not exercise their right to prohibit it.

35. The defendants have promoted the new facilities at LAX through press releases to print, television and radio media and through the purchase of radio advertising.

36. Immediately prior to, and during the 1984 summer Olympic Games in Los Angeles, free standing "Olympic Family" booths were set up by the LAOOC with the express consent of the defendants within the terminal areas at LAX. The purposes of the booths was to provide information to athletes and/or other Olympic officials who were members of the "Olympic Family." Upon request, personnel working in said booths provided general information to members of the general public.

37. On approximately July 25, 1984, television crews filmed a demonstration of the operation of a Mobile Emergency Rescue Vehicle (MERV) inside a terminal at LAX for subsequent broadcast to the public on commercial television networks. MERV is part of the medical response program provided by defendants at LAX.

38. Defendants have known that various people and groups have wished to conduct and, in some instances,

have conducted speech-related activities within the terminal areas at LAX.

39. The activities described in Paragraph 38, above, were conducted against the wishes and policies of defendants and without the express permission of defendants.

40. The Department has never given the Plaintiffs, or any of them, explicit permission to distribute free religious literature within the terminal facilities at LAX.

41. The Plaintiffs, and each of them, have distributed free religious literature within the terminal facilities at LAX during the past ten years.

42. In the past, the Department has received a variety of requests from people in numerous organizations who wish to conduct activities which defendants believed were non-airport related, including First Amendment activities, within the terminal facilities at LAX. Examples of organizations which have requested, but have been denied, permission to use the terminal facilities are: The Red Cross, Salvation Army, Girl Scouts, Boy Scouts, Ford Motor Company, Iran Relief Fund, Hunger Campaign, KCET, Women's Sports Foundation, and Verdi Restorante.

43. The Department has denied the requests referred to in paragraph 42 to conduct First Amendment activities within the terminal facilities and has thus precluded those activities from taking place within the terminal areas of LAX.

44. The Department is a department of the City and is financially self-sufficient and does not rely on or use tax revenues to finance its operations.

45. The monies necessary to pay for the operation and the development of LAX are collected from all persons

using or occupying LAX on a consistent and regular basis.

46. Individual members of the traveling public and other members of the general public who enter and/or utilize the interior terminal areas at LAX are not charged any fee by the Department for their use of the terminal facilities.

47. Most persons occupying space on an extended basis within the terminal facilities pay either a rental based on the square feet occupied or a percentage of gross revenues derived from the use of that space or both. For example, the concession agreements and leases with the rent-a-car companies require that those companies pay a rent for the space occupied inside their terminal facilities and also a percentage of gross receipts in order to conduct their business at LAX. The news and gift stands and the food and beverage stands within the terminal facilities pay both rent and a percentage of gross receipts on a similar basis. Air carriers also pay a square-footage rental based on the area they occupy within the terminal facilities for ticket counters, baggage claim areas, waiting areas, and loading gates. In addition, air carriers pay a landing fee based on the weight of the aircraft which land at LAX.

48. The only exceptions to the policy set forth in paragraph 47 above are: (a) the various federal inspection services such as customs and immigration: (B) the Travelers Aid Society which provides information services to the traveling public; and (c) the USO which provides assistance to military travelers.

49. The monies collected from rents, concession fees, permit charges and landing fees described in paragraph 47 above pay for the Department's bonded indebtedness and the expenses necessary to operate LAX.

50. The Board has attempted to limit use of the terminal facilities at LAX to those activities which it believes directly aid the traveling public.

51. The Board has not expressly permitted any commercial or First Amendment activities within the CTA which defendant believes are unrelated to LAX and the services it provides.

52. On July 13, 1983, the Board passed Resolution No. 13787.

53. The only exception to the rules set forth in Resolution No. 13787 provides that anyone wishing to exercise his First Amendment rights within the CTA must do so on the sidewalks outside of and in front of the terminal buildings.

54. Resolution No. 13787 does not prohibit, and the defendants have never prohibited, anyone from entering the terminal facilities at LAX.

55. Jews for Jesus, Inc. ("Jews for Jesus") is a nonprofit religious corporation duly organized and operating pursuant to, the laws of the state of California.

56. Jews for Jesus is an expression of the Christian faith which, as one of its principle purposes, preaches the Gospel of Jesus Christ, and promotes religious ideals consistent with the Old Testament and the New Testament.

57. Avi Snyder ("Snyder") is an individual member and minister of Jews for Jesus and is the Los Angeles director of Jews for Jesus.

58. The acts and practices of all of the named defendants and their agents, as described herein, were performed under color of state law and were actions of the state within the meaning of 42 U.S.C. § 1983 and Fourteenth Amendment to the United States Constitution.

59. Snyder, and other members of the plaintiff Jews for Jesus, have on several occasions distributed literature inside the terminal facilities at LAX.

60. Distribution of religious literature and leaflets, free of charge by members of Jews for Jesus, including Snyder, provides information to the general public about the religious teachings of Christianity and is a method by which plaintiffs evangelize.

61. It is the express policy of Jews for Jesus that its members, including Snyder, must neither solicit nor accept, any money whatsoever, while distributing free religious literature in the terminal buildings of LAX.

62. Jews for Jesus has a general policy which forbids its members, including Snyder, while engaged in the free distribution of religious literature at any location, including the interior terminal walkways of LAX, from harassing, interfering with, blocking, obstructing, physically touching or otherwise intentionally annoying any other person.

63. The parties are not aware of any occasion on which a member of Jews for Jesus, including Snyder, while engaged in the free distribution of religious literature in the interior terminal walkways of LAX, has intentionally harassed, interfered with, blocked, obstructed, physically touched in an offensive manner or otherwise intentionally annoyed any other person.

64. On July 13, 1983, the Board, acting pursuant to authority vested in it by City, enacted Resolution No. 13787. This resolution, on its face, bans, among other things, all "First Amendment activities" from the interior of terminal areas at LAX otherwise open to the public without restriction, including the pedestrian walkways located within said terminals.

65. Resolution No. 13787 purports to ban all airport activities which defendants believe to be non-airport related.

66. Resolution No. 13787 allows the conduct of First Amendment activities on the sidewalks immediately outside of the terminals located at LAX.

67. On July 6, 1984, at approximately 10:00 a.m. in LAX Terminal 4, Snyder was engaged in the distribution of Jews for Jesus religious literature on a pedestrian walkway. In distributing the religious literature, Snyder was not blocking any entrance, exit, stairway, escalator, elevator, door, or otherwise inhibiting the free flow of pedestrian traffic on the pedestrian walkway located inside Terminal 4 at LAX.

68. During the distribution of free religious literature as described in Paragraph 67, Snyder was not touching, annoying, blocking, obstructing, or otherwise harassing any other person present in the immediate vicinity of his location on the pedestrian walkway located in the interior of Terminal 4 at LAX.

69. At or about the time that Snyder was engaged in the activities described in Paragraph 67 and 68, above, a uniformed peace officer, acting pursuant to Resolution 13787, approached Snyder and handed him a copy of Resolution 13787. Pursuant to the policy of the defendants as reflected in the Resolution, the peace officer ordered Snyder to cease distribution of any literature within the terminal areas at LAX, including the pedestrian walkways where the activities had, up to that point, been conducted. The peace officer further advised Snyder that any failure to comply with his order would subject Snyder to legal action by the City Attorney pursuant to the express terms of Resolution No. 13787. Snyder ceased

the distribution of literature and left the interior terminal in compliance with the order of the peace officer.

70. The acts of the peace officer as described in Paragraph 69, above, were performed under color of state law pursuant to the express policy of the Board as set forth in Resolution No. 13787 had the purpose and effect of preventing Snyder from engaging in the distribution of free religious literature anywhere inside the LAX terminal buildings, including the pedestrian walkway where he had been engaged in the distribution of free religious literature.

71. Defendants have prevented and/or chilled, (and will continue to prevent and/or chill) plaintiffs' distribution of free religious literature inside the terminal areas at LAX pursuant to upon Resolution No. 13787.

72. If, as the plaintiffs contend, Resolution No. 13787 is unconstitutional on its face or as applied to plaintiffs' activities inside of the terminal areas at LAX, then plaintiffs have suffered, are suffering, and will continue to suffer irreparable harm.

73. If, as the plaintiffs contend, Resolution No. 13787 is unconstitutional on its face or is applied to plaintiffs' activities, plaintiffs have no plain, speedy, or adequate remedy at law to address said constitutional violations and any of the remedies to which plaintiff could be relegated would be attended by such uncertainties and delays that they would cause further irreparable damages, injury and inconvenience to plaintiffs. Damages are not adequate to protect plaintiffs from the continuing injury which would arise from said constitutional violations.

74. Defendants permit the operation of a Christian Science Reading Room inside terminal 7. This Reading Room is open to the public. The Reading Room displays

religious literature pertaining to the Christian Science faith. The Reading room has been in operation in the same location inside of the terminal building since 1966. The Reading Room has occupied and now occupies leased space for which it pays a monthly rental of $510.00.

STIPULATION RE USE OF PHOTOGRAPHIC EXHIBITS IN THE DISTRICT COURT

MR. GOTHELF: As to the pictures, your Honor, we would like to enter into a stipulation on the record, to define the parameters for the purpose for which those are being offered, and then if I may read from a stipulation that Counsel and I have agreed to.

THE COURT: All right.

MR. GOTHELF: It is hereby stipulated, by and between the parties hereto, Jews for Jesus, Inc., et al. and the Board of Airport Commissioners of the City of Los Angeles, et al., through their attorneys of record, that exhibits 2 through 89 will be introduced into evidence for the limited purpose of depicting the physical layout of an inanimate object in the interior terminal facilities and the sidewalk areas in front of the terminal facilities at Los Angeles International Airport.

THE COURT: Does that correctly state your stipulation?

MR. KAPEL: Yes, yes, it is, your Honor. We would stipulate to that.

District Court Transcript, P5

EXHIBIT LIST FOR TRIAL

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JEWS FOR JESUS, INC., a California non-profit religious corporation and ALAN HOWARD SNYDER, a.k.a. AVI SNYDER,
Plaintiffs, and Counterdefendants,

VS.

THE BOARD OF AIRPORT COMMISSIONERS OF THE CITY OF LOS ANGELES; JOHNNIE L. COCHRAN, JR., President of the Los Angeles Board of Airport Commissioners; ROBERT A. CHICK, Vice-President of the Los Angeles Board of Airport Commissioners; and D. A. "CURT" CURTISS, MARIA D. HUMMER , AND SAMUEL GREENBERG, Members of the Los Angeles Board of Airport Commissioners, the last five in their official and individual capacities; and the CITY OF LOS ANGELES, a municipal corporation,
Defendants and Counterclaimants.

AND RELATED COUNTER-CLAIMS

Civil No. 84-5268 ER (Gx)

MESERVE, MUMPER & HUGHES
PAUL G. GEORGE
BRUCE A. GOTHELF
JOEL D. COVELMAN
333 South Hope Street, 35th Floor
Los Angeles, California 90071
Telephone: (213) 620-0300
Attorneys for plaintiffs and Counterdefendants Jews for Jesus, Inc. and Avi Snyder

Exhibit Number	Description
1	STIPULATED FACTS

PHOTOGRAPH EXHIBITS

Exhibit Number	Terminal	Description
2	One	Ticketing Area
3	One	Ticketing Area (Escalator to Gates)
4	One	Gate Level Walkway
5	One	Walkway on Gate Level
6	One	Escalator from Ticketing Level to Gate Level
7	One	Gate Level Walkway (Coffee Shop)
8	Two	Outside (Upper Level)
9	Two	Outside (Lower Level)
10	Two	Ticketing Area
11	Two	Ticketing Area
12	Two	Walkway to Gates (Travel Insurance Booth)
13	Two	Walkway to Gates
14	Two	Escalator Area
15	Two	Departure Level (Currency Exchange) (Christmas Tree)
16	Two	Departure Level (Security)
17	Two	Information Booth
18	Two	Foreign Currency Exchange (Arrival Level)
19	Two	Traveler's Aid Booth
20	Two	Duty Free Shop
21	Two	"Think before you buy!"
22	Two	Restaurant and Cocktails
23	Two	Waiting Area
24	Two	Duty Free Shop and Waiting Area
25	Three	Outside (Upper Level)
26	Three	Ticketing Area
27	Three	Information Board
28	Three	Departure Level Connecting Tunnel
29	Three	Walkway to Gates
30	Three	Duty Free Shop

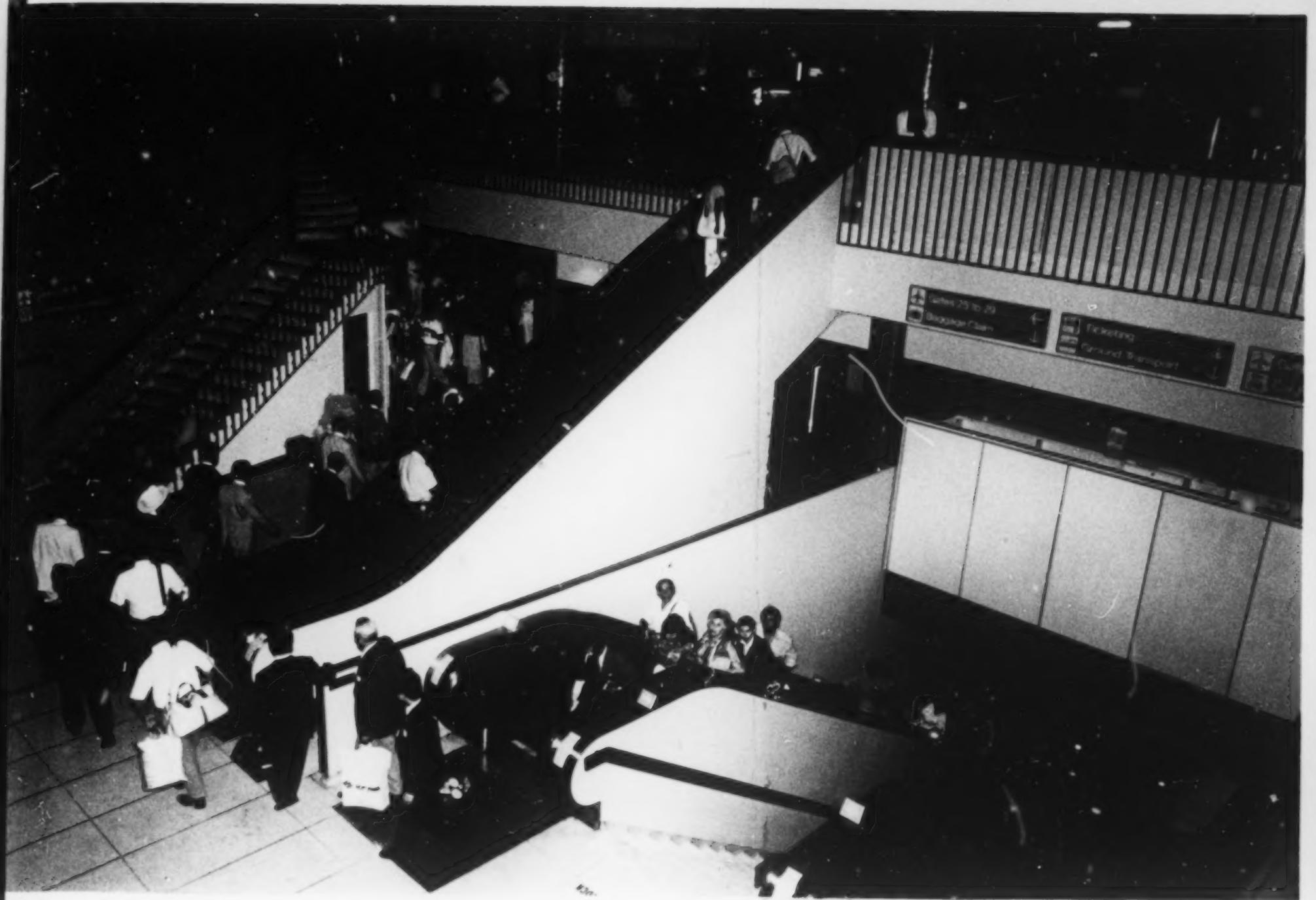
Exhibit Number	Terminal	Description
31	Four	Upper Level Sidewalk
32	Four	Lower Level Sidewalk
33	Four	Ticketing Area
34	Four	Ticketing Area
35	Four	Security Area
36	Four	Security Area
37	Four	Walkway to Gates
38	Four	Walkway (Cocktail Lounge)
39	Four	News and Gift Shop
40	Four	Gates and Walkway
41	Four	Gate Level (Escalators to Lower Level with Newsstand and Cocktail Lounge)
42	Four	Gate Area
43	Four	Gate Area
44	Four	Gate Area (Bar with TV)
45	Five	Outside (Upper Level)
46	Five	Information Board
47	Five	Ticketing Area
48	Five	Ticketing Level (Escalators to Lower Level)
49	Five	Ticketing Level (Escalators to Lower Level)
50	Six	Outside (Upper Level)
51	Six	Ticketing Area
52	Six	Ticketing Area
53	Six	Ticketing Area
54	Seven	Outside (Lower Level)
55	Seven	Walkover Bridge
56	Seven	Baggage Claim
57	Seven	Ticketing Area
58	Seven	Ticketing Area
59	Seven	Ticketing Area
60	Seven	Ticketing Area
61	Seven	Walkway to Gates
62	Seven	Upper Level Walkway
63	Seven	Upper Level Walkway
64	Seven	Christian Science Reading Room

Exhibit Number	Terminal	Description
65	Seven	Christian Science Reading Room
66	Seven	Christian Science Reading Room
67	Seven	Gate Area
68	Seven	Gate Area with Open Air Cocktail Lounge
69	Seven	Gate Area
70	Seven	Gate Area (Cocktail Lounge with Christmas Tree)
71	International	Outside Sidewalk
72	International	Outside Sidewalk
73	International	Outside (Lower Level)
74	International	Sidewalk and Entrance (Lower Level)
75	International	Lower Level Exterior
76	International	Sidewalk and Entrance (Outdoors)
77	International	Downstairs
78	International	Arrival Level
79	International	Ticketing "Streets"
80	International	Ticketing "Streets"
81	International	Ticketing "Streets"
82	International	Ticketing "Streets"
83	International	Ticketing "Streets"
84	International	Ticketing "Streets"
85	International	Ticketing "Streets"
86	International	Ticketing "Streets"
87	International	Ticketing "Streets"
88	International	Information Board
89	International	Security Checkpoint Area

EDITOR'S NOTE

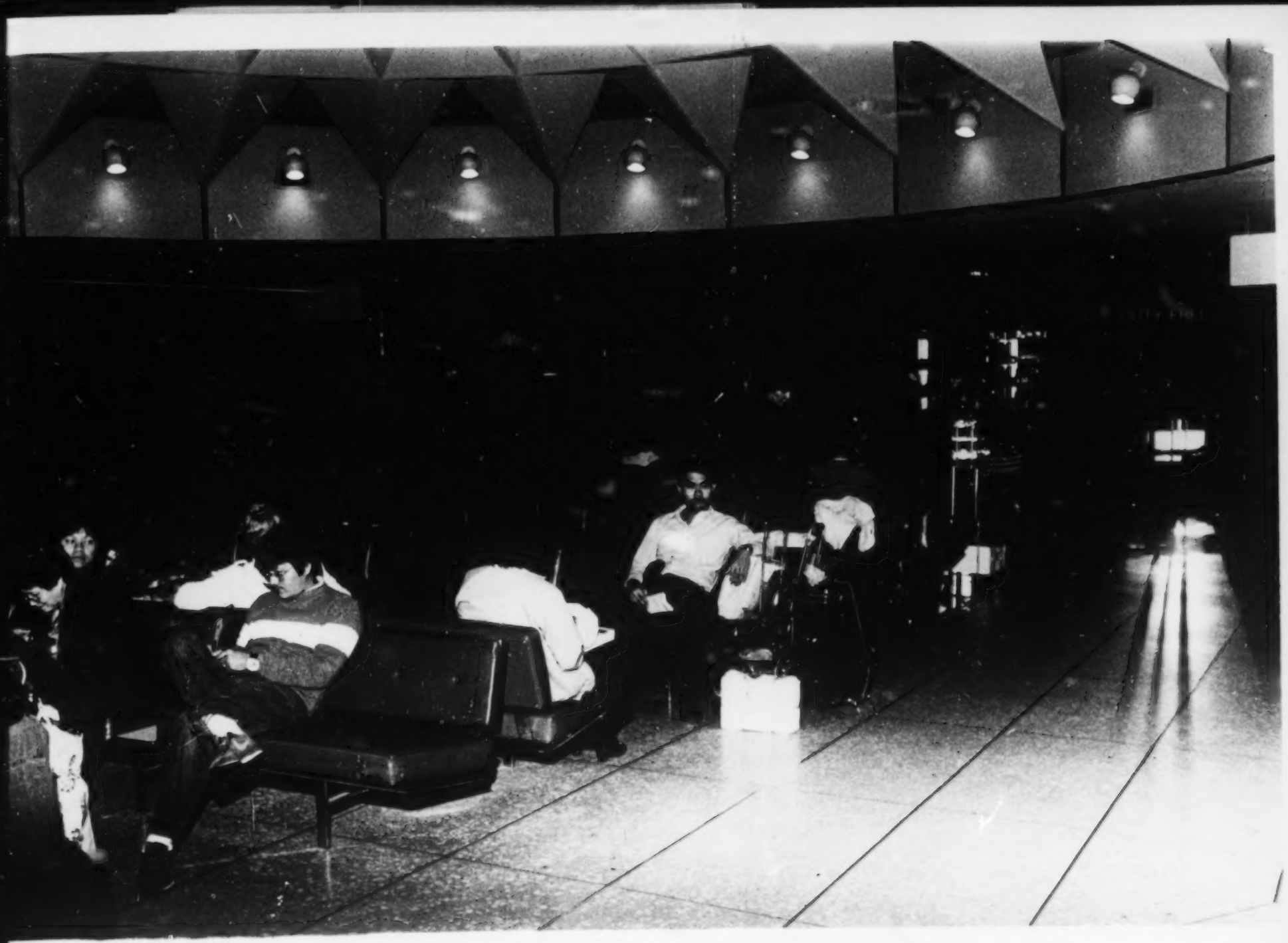
THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

Baggage Claim · Ground Transport


Gates 25 to 29
Baggage Claim
Ticketing
Ground Transport

THINK BEFORE YOU BUY!

COCKTAILS



HOTEL-MOTEL INFORMATION
HOTEL-MOTEL INFORMATION

DUTY FREE
Duty Free Shoppers
DUTY FREE SHOP
GIFTS & NEWS

HACIENDA

Western
Baggage
Claim

American Information Center
American

Gates 40 · 42 thru 49
Coffee Shop · Cocktails · Gift Shop · Admirals Club

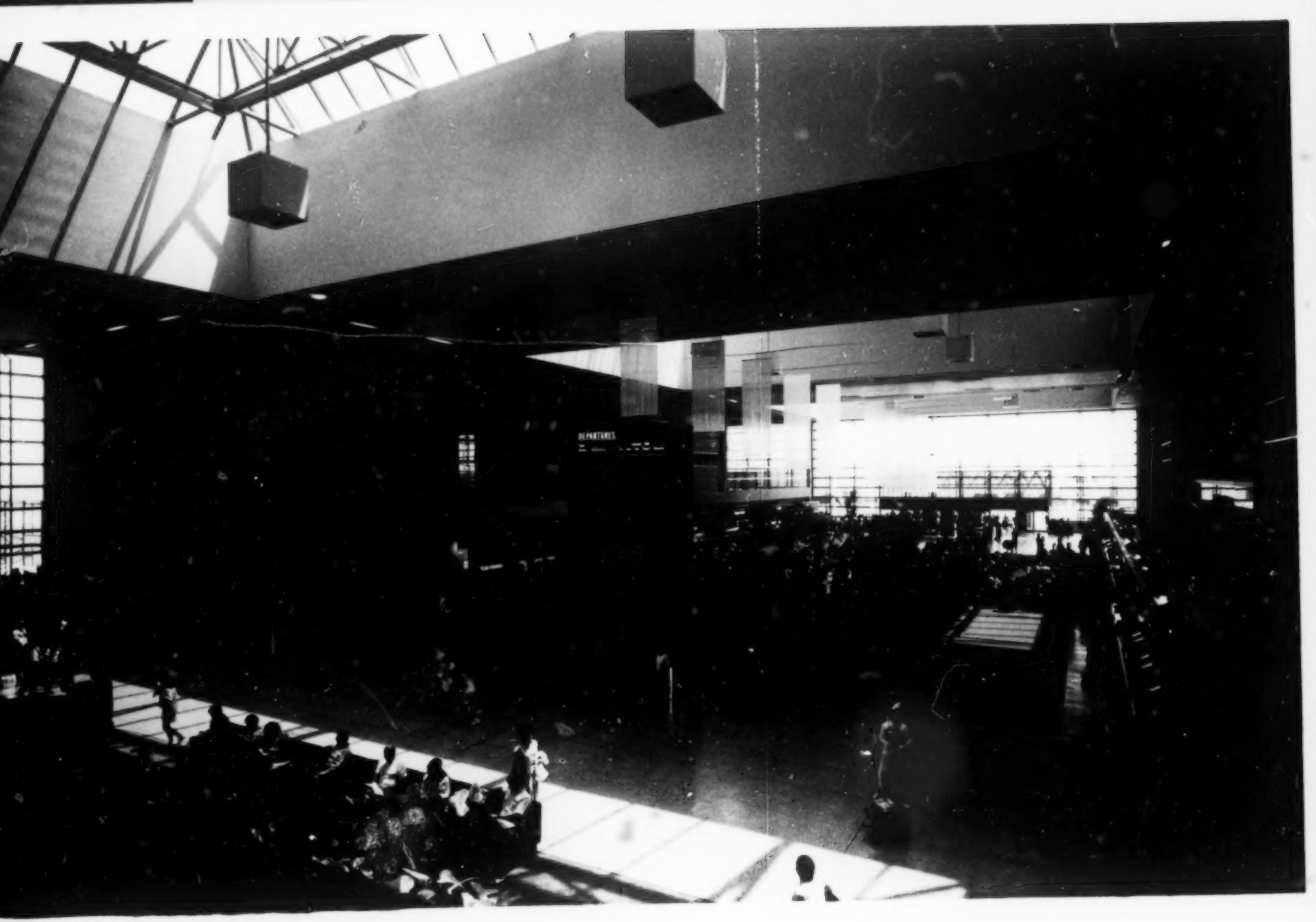
Gate 41 Baggage Claim Ground Transport
Sun Aire Desert Sun Air Spur (Heliport)

Gift Shop

Baggage Claim
Ground Transport

CHRISTIAN
SCIENCE
READING
ROOM
EXIT

Terminal and


DEPARTURES

DEPARTURES

Supreme Court, U.S.
FILED
NOV 20 1986
JOSEPH F. SPANIOL, JR.
CLERK

ORIGINAL

No. 86-104

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1986

THE BOARD OF AIRPORT COMMISSIONERS
OF THE CITY OF LOS ANGELES, et al.,
Petitioners,

VS.

JEWS FOR JESUS, INC., AND ALAN HOWARD SNYDER,
a.k.a. AVI SNYDER
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONERS

JAMES K. HAHN, City Attorney
JAMES H. PEARSON, Senior
Assistant City Attorney
JAMES R. KAPEL,*
Assistant City Attorney
#1 World Way
Los Angeles, CA 90009
(213) 646-3260
Attorneys for Petitioners
**Counsel of Record*

Bowne of Los Angeles, Inc., Law Printers. (213) BOWNE CO

35 pp

QUESTIONS PRESENTED FOR REVIEW

1. Have Petitioners constitutionally limited the uses of the interiors of the terminal facilities at Los Angeles International Airport to their dedicated and intended airport-related purposes or are those facilities traditional public forums or have they been opened as public forums such that Petitioners are required to permit their use for non-airport related activities?

2. If the interiors of the terminal facilities at Los Angeles International Airport are not public forums, is the Petitioners' policy that limits the uses of those facilities to airport-related purposes a reasonable exercise of their right to reserve the uses of the terminal facilities to their dedicated and intended airport-related purposes?

LIST OF ALL PARTIES

Petitioner Board of Airport Commissioners of the City of Los Angeles ("Board") is charged by the Los Angeles City Charter with the management and control of the Los Angeles Department of Airports and the Los Angeles International Airport; Petitioner Johnnie L. Cochran, Jr. was the President of the Board and presently is a member of the Board; Petitioners Robert A. Chick, Maria D. Hummer and Samuel Greenberg were and presently are members of the Board; D.A. "Curt" Curtiss was a member of the Board at the time the initial action was brought but has since resigned the position and was replaced by Petitioner Jerry B. Epstein. Petitioner City of Los Angeles is a municipal corporation and the owner of the real property and facilities that comprise Los Angeles International Airport.

Respondent Jews for Jesus, Inc., is a California nonprofit religious corporation; Respondent Alan Howard Snyder, a.k.a. Avi Snyder, is a member and minister of the Jews for Jesus organization.

TABLE OF CONTENTS

	Page
Questions Presented For Review	i
List Of All Parties	ii
Opinions Below	1
Jurisdiction	2
Constitutional, Statutory, Etc., Provisions Involved	2
Statement Of The Case	3
Summary Of Argument	7
A. The Interiors of the Terminal Facilities at Airport Are Not Traditional Public Forums	7
B. The Interiors of the Terminal Facilities at Airport Have Not Been Opened as First Amendment Forums But, Rather, Have Been Limited to Their Intended Dedicated Purposes	9
C. Limiting the Uses of the Interiors of Terminal Facilities to Their Intended and Dedicated Airport-Related Purposes Only is Reasonable	11
Argument	12
A. The Interiors of Terminal Facilities Are Not Traditional Public Forums	13
B. Petitioners Have Not Opened the Interiors of the Terminal Facilities at Airport as Public Forums But, Rather, Have Reserved Them for Their Intended Purposes	17
C. It is Eminently Reasonable to Restrict the Use of the Interiors of Airport Terminals to Airport-Related Activities and to Exclude All Non-Airport Related Activities	22
Conclusion	27

TABLE OF AUTHORITIES

Cases

Page

Adderley v. Florida, 385 U.S. 39, 17 L.Ed.2d 149, 87 S.Ct. 242 (1966) 17

City Council v. Taxpayers for Vincent, 466 U.S. 789, 80 L.Ed.2d 772, 104 S.Ct. 2118 (1984) 8, 9, 11, 12, 14, 15, 16, 22, 24, 25, 27

Clark v. Community for Creative Non-Violence, 468 U.S. ____, 82 L.Ed.2d 221, 104 S.Ct. ____ (1984) 12, 27

Cornelius v. N.A.A.C.P., 53 U.S.L.W. 5116, 473 U.S. ____, 87 L.Ed.2d 567, 105 S.Ct. 3439 (1985) 8, 9, 10, 11, 12, 15, 17, 18, 21, 25

Greer v. Spock, 424 U.S. 828, 47 L.Ed.2d 505, 96 S.Ct. 1211 (1976) 9, 10, 14, 15, 16, 17, 19, 21, 23, 26

Hague v. C.I.O., 307 U.S. 496, 83 L.Ed. 1423, 59 S.Ct. 954 (1939) 8, 14

Heffron v. ISKCON, 452 U.S. 640, 69 L.Ed.2d 298, 101 S.Ct. 2559 (1981) 12, 27

Jones v. North Carolina Prisoners' Union, 433 U.S. 119, 53 L.Ed.2d 629, 97 S.Ct. 2532 (1977) 21

Lehman v. Shaker Heights, 418 U.S. 298, 41 L.Ed.2d 770, 94 S.Ct. 2714 (1974) 26

Perry Ed. Assn. v. Perry Local Ed. Assn., 460 U.S. 37, 74 L.Ed.2d 794, 103 S.Ct. 948 (1983) ..... 7, 10, 11, 14, 15, 17, 18, 19, 21 , 22, 23, 24, 25, 26

United States v. Grace, 461 U.S. 171, 75 L.Ed.2d 736, 103 S.Ct. 1702 (1983) 8, 9, 14, 17

U.S. Postal Service v. Greenburgh Civic Assn., 453 U.S. 114, 69 L.Ed.2d 517, 101 S.Ct. 2676 (1981) 9, 11, 14, 17, 24, 25, 26

Table of Authorities

Constitution

	Page
United States Constitution, First Amendment ...	2

Statutes

United States Code, Title 28, Sec. 1254(1)	2
United States Code, Title 28, Sec. 1331	2
United States Code, Title 28, Sec. 1343(3)	2
United States Code, Title 42, Sec. 1983	2

No. 86-104

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1986

THE BOARD OF AIRPORT COMMISSIONERS
OF THE CITY OF LOS ANGELES, et al.,
Petitioners,

VS.

JEWS FOR JESUS, INC., AND ALAN HOWARD SNYDER,
a.k.a. AVI SNYDER
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The Opinion of the Court of Appeals is reported in 785 F.2d 791 (9th Cir. 1986). (Cert. Pet., App. B.)

The Memorandum Decision and Judgment of the District Court was not reported. (Cert. Pet., App. A.)

JURISDICTION

The Judgment of the Court of Appeals was entered on March 25, 1986. An extension of time within which to file a Petition for Writ of Certiorari to and including July 23, 1986, was granted by the Honorable William H. Rehnquist. The Petition for Writ of Certiorari was granted on October 6, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

The jurisdiction of this case in the District Court was based upon 28 U.S.C. §§ 1331, 1343(3).

CONSTITUTIONAL, STATUTORY, ETC., PROVISIONS INVOLVED

(1) The First Amendment to the United States Constitution provides:

> "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

(2) Title 42 U.S.C. § 1983 provides:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia

> shall be considered to be a statute of the District of Columbia. R.S. § 1979; Pub.L. 96-170, § 1, Dec. 29, 1979, 83 Stat. 1284."

(3) The Los Angeles Board of Airport Commissioners Resolution No. 13787 that is the subject matter of this litigation is set forth in the Joint Appendix.

STATEMENT OF THE CASE

This case involves the constitutionality of the Board of Airport Commissioners' ("Petitioners") Policy that limits the uses of the interiors of airport terminal facilities at Los Angeles International Airport ("Airport" or "LAX") to airport-related purposes only. (J.A. 1a-6a, 17a.) Petitioners' Policy ("Policy") can be summarized as follows:

> "The Los Angeles International Airport shall be limited to airport-related uses only except that the sidewalk areas immediately outside of the terminal facilities may be used for activities protected by the First Amendment." (J.A. 1a-6a, 17a.)

The facts in this case are not in dispute. Airport is owned by the City of Los Angeles and operated by the Department of Airports, which is under the management and control of the Petitioners. (J.A. 7a.) The duties and obligations of the Board and the Department's General Manager are set forth in the Los Angeles City Charter ("Charter"), which requires the Department to operate all of its properties for the promotion and accommodation of air commerce and air navigation or uses incidental thereto. (J.A. 9a-10a.) In other words, the Board and its Department are required by the Charter to devote airport property exclusively to those activities that aid the traveling public (J.A. 10a.)

Respondent Jews for Jesus is a religious organization that wishes to advance its religious cause by having its

members distribute religious pamphlets in the interiors of the terminal facilities at Airport. When Respondent's members were prevented from conducting their non-airport related activities in the interiors of the terminal facilities, Respondent Jews for Jesus and one of its ministers filed suit to enjoin the enforcement of Petitioners' Policy claiming the interiors of the terminal facilities at Airport were public forums.

LAX is the third busiest airport in the world, handling more than 32 million passengers in 1982 and 33 million passengers in 1983. (J.A. 9a.) At least a similar number of "meeters and greeters" enter LAX to pick up or drop off airline passengers. (J.A. 9a.)

LAX is the largest destinational airport in the world with the largest number of enplaning and deplaning passengers. (J.A. 9a.) Approximately 75 percent of the 32 million passengers who used LAX in 1982 either commenced or ended their flight travel at LAX. (J.A. 9a.) Accordingly, at least 75 percent of all passengers arriving at or departing from LAX must use the sidewalks in front of the terminal facilities. (J.A. 9a.) Due to the dedicated uses of LAX, the large demand for space within the terminal facilities, and the Charter obligations, the Board has had a consistent policy of allowing in the terminal facilities only those activities that directly aid the traveling public. (J.A. 11a.)

The Central Terminal Area of Airport (hereinafter "CTA"), contains eight terminal facilities, the parking structures and lots, and a series of private streets and roadways that provide ingress and egress to the various services in the CTA. (J.A. 7a.) The major private roadway in the CTA is World Way, a double-leveled, U-shaped roadway providing ingress and egress to the CTA. (J.A. 7a-8a.)

Each of the eight terminal facilities contains ticketing areas, baggage claim areas, check-in gates, loading gates, restaurants, newsstands, gift shops, flight insurance counters, rent-a-car counters, information counters, and general waiting areas. (J.A. 7a-8a.) Some of the terminals have offices and privately provided waiting areas on the level above the aircraft loading level in the satellite buildings. (J.A. 8a.)

Several construction projects at LAX designed to reduce the vehicular and pedestrian congestion within the CTA have recently been completed. (J.A. 8a.) Generally speaking, a departing passenger will arrive at LAX on the second level, cross the sidewalk, enter into the ticketing area, and then proceed to the loading gates and the aircraft. (J.A. 8a.) A passenger arriving at LAX will enter the satellite area, proceed to the lower level to claim any baggage and then proceed to the sidewalk and street area. (J.A. 8a.)

Airport is designed and operated with the sole purpose of aiding the traveling public by providing the services necessary to arriving or departing passengers. The Board consistently has limited the activities within the CTA to those that will directly aid the traveling public and this limitation consistently has been applied to all who have requested permission to conduct activities at Airport. (J.A. 11a, 15a, 17a.) Thus, the Board has refused permission to conduct non-airport related activities within the terminal facilities to such groups as the Red Cross, the Salvation Army, the Girl Scouts, the Boy Scouts, the Ford Motor Company, Iran Relief Fund, the Hunger Campaign, KCET, the Women's Sports Foundation, and a host of other charitable, religious, and commercial enterprises. (J.A. 15a.) The general public is not denied entrance into the terminal facilities. (J.A. 13a.) Likewise,

Petitioners do not have or enforce a dress code for persons entering the terminal facilities. (J.A. 13a.)

Respondent Jews for Jesus is a non-profit religious organization and Respondent Alan Snyder is a minister for that organization. (J.A. 17a.) Respondents wished to advance their religious cause by distributing religious pamphlets in the interiors of the terminal facilities at Airport. Respondents were informed of the Petitioners' Policy restricting the uses of the interiors of the terminal facilities to airport-related purposes only and were told to stop conducting their religious activities within the terminals. (J.A. 19a.) After Respondents were prevented from pamphleteering within the terminal facilities (but not on the sidewalks outside), they filed the present action to enjoin enforcement of Petitioners' Policy.

Respondents were not and have not been prevented from using the interiors of the terminal facilities at Airport for their own travel-related purposes. Rather, Respondents were deterred from using those facilities for their non-airport related, religiously related purposes. (J.A. 19a.) Likewise, Respondents were not prevented from using the sidewalk areas outside the terminal facilities at Airport for their religious distribution efforts. Further, there is no indication or allegation that Respondents were singled out because of their particular message. (J.A. 15a.) Rather, Respondents are just one of the many charitable groups, religious organizations and commercial enterprises that have been denied use of the interiors of the terminal facilities at Airport because those activities would neither advance air navigation nor directly aid the traveling public. (J.A. 11a, 15a.)

The District Court for the Central District of California, on stipulated facts, treated the parties' trial briefs as cross motions for summary judgment and, in an unpublished memorandum decision, declared the Petitioners'

Policy unconstitutional and enjoined its enforcement. In so deciding, the District Court determined that the interiors of the airport terminal facilities at Airport were public forums (probably traditional public forums). (Cert. Pet., App. B.)

The Court of Appeals for the Ninth Circuit, in its Opinion, affirmed the judgment of the District Court and held that the terminal facilities at Airport were traditional public forums and, accordingly, could only be limited by time, place and manner restrictions. (Cert. Pet., App. A.)

SUMMARY OF ARGUMENT

The determinative issue in this case is whether the airport terminal facilities at LAX are public forums. The answer to this question will determine whether the Petitioners can operate their Airport solely and exclusively as an airport, prohibiting its use for non-airport related activities, or whether Petitioners must allow non-airport related activities within its terminals. If the interiors of the terminal facilities are not public forums, Petitioners legally can limit the uses of the facilities to their intended and dedicated airport-related purposes. If the interiors of those facilities are traditional public forums or have been opened by Petitioners as public forums, then non-airport related activities protected by the First Amendment must be allowed within the terminals restricted only by "time, place and manner restrictions."

A. The Interiors of the Terminal Facilities at Airport Are Not Traditional Public Forums

Traditional public forums are those places that by long tradition or by government fiat have been devoted to assembly and debate. *Perry Ed. Assn. v. Perry Local Ed. Assn.*, 460 U.S. 37, 45, 74 L.Ed.2d 794, 103 S.Ct. 948

(1983). A principal purpose of a traditional public forum is the free exchange of ideas. *Cornelius v. N.A.A.C.P.,* 53 U.S.L.W. 5116, 5119, 473 U.S. ____, ____, 87 L.Ed.2d 567, 580, 105 S.Ct. 3439 (1985).

Traditional public forums "have immemorially been held in trust for use by the public and . . . have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Hague v. C.I.O.,* 307 U.S. 496, 515, 83 L.Ed. 1423, 59 S.Ct. 954 (1939). Streets, sidewalks, and parks are prime examples of public forums because of their historical association with and dedication to the exercise of expressive activities. *U.S. v. Grace,* 461 U.S. 171, 177, 75 L.Ed.2d 736, 103 S.Ct. 1702 (1983). In order for a government-owned facility to be a traditional public forum, there must exist "a traditional right of access . . . for purposes of . . . communication comparable to that recognized for streets and parks . . ." *City Council v. Taxpayers for Vincent,* 466 U.S. 789, 814, 80 L.Ed.2d 772, 104 S.Ct. 2118 (1984).

The principle purposes of airport terminal facilities are to promote air transportation and to aid the traveling public. They do not have as their principal purpose the free exchange of ideas. The exclusive purposes of LAX are to promote air navigation and to aid the traveling public. The government fiat regarding Airport is set forth in the Charter, which requires that the airport property be used solely and exclusively for its intended airport-related functions. (J.A. 9a-10a.) There is no dedication to, or traditional right of access for, communicative purposes at LAX. Without that dedication or long tradition of use for communicative purposes, a government-owned facility is not a traditional public forum and can be reserved for its intended purposes.

Likening the physical characteristics of streets and sidewalks to the interior hallways of terminal facilities

does not establish that these facilities have a traditional right of access for communicative purposes similar to that recognized in streets and parks. *City Council v. Taxpayers for Vincent, supra,* at p. 814; *Greer v. Spock,* 424 U.S. 828, 47 L.Ed.2d 505, 96 S.Ct. 1211 (1976). The interiors of the terminal facilities at LAX are clearly distinguishable from those open sidewalks and parks that by long tradition have been devoted to assembly and debate. Without a traditional dedication to speech activities, a government facility clearly designed, dedicated and intended for non-communicative purposes is not a traditional public forum.

B. The Interiors of the Terminal Facilities at Airport Have Not Been Opened as First Amendment Forums But, Rather, Have Been Limited to Their Intended Dedicated Purposes.

Petitioners have the right "to preserve the property under its control for the use to which it is lawfully dedicated." *U.S. Postal Service v. Greenburgh Civic Assn.* 453 U.S. 114, 129, 69 L.Ed.2d 517, 101 S.Ct. 2676 (1981). Furthermore, a government is not required to open all of its facilities for unrelated public expression. *U.S. v. Grace, supra,* at pp. 177-178.

The important factor in determining whether a government-owned facility has been opened as a public forum is the intent of the government operator. It is this intent that distinguishes a government facility that has been opened as a public forum from one that has been reserved for its non-forum purposes. This Court has explained that: "[t]he government does not create a public forum by inaction or by permitting limited discourse but *only by intentionally opening* a non-traditional public forum *for public discourse.*" *Cornelius v. N.A.A.C.P., supra,* at p. 5120, L.Ed.2d at p. 580. (Emphasis added.) Furthermore, this Court in *Cornelius* stated that "[w]e will not

find a public forum has been created in the face of clear evidence of a contrary intent . . . ." *Cornelius v. N.A.A.C.P., supra*, at p. 5120, L.Ed.2d at p. 580.

Petitioners in this case neither intentionally nor unintentionally have opened the interiors of the terminal facilities at Airport for public discourse. Petitioners' intent to limit the facilities to their intended airport-related purpose is clear from their long-standing policy reaffirmed by the resolution at issue in this case. (J.A. 11a, 17a.) Petitioners' intent is also clear from their actions in allowing or disallowing certain activities within the terminal facilities. (J.A. 11a, 15a, 17a.) Petitioners are required to and have limited the uses of the terminal facilities at Airport to their dedicated and intended airport-related purposes. (J.A. 9a-10a.) In light of this clear dedication and use of the interiors of the terminal facilities, it cannot be said that Petitioners intended to or did open the facilities at LAX as public forums for expressive activities and, therefore, this Court should not find that a public forum has been created.

The fact that certain activities protected by the First Amendment have occurred or have been permitted within the facilities does not serve to convert those facilities into public forums. *Greer v. Spock, supra*, at p. 438, n. 10. This Court said in *Perry Ed. Assn. v. Perry Local Ed. Assn., supra*, at p. 47, that there must be a showing of "indiscriminate use" for unrelated activities or that "permission has been granted as a matter of course to all who seek to distribute material" before a facility will have been deemed to have been opened as a public forum.

In the present case, permission to conduct non-airport related activities has been denied as a matter of course. (J.A. 11a, 15a, 17a.) No permission has been given to conduct any non-airport related activity within the terminal facilities. Furthermore, Petitioners have clearly in-

tended to limit the airport terminal facilities to their intended and dedicated purposes. The Petitioners' Policy limiting the uses of the interiors of the terminal facilities to airport-related purposes and the Petitioners' practice of denying permission to conduct non-airport related activities within those facilities make it abundantly clear that the interiors of the terminal facilities at LAX have not been opened as public forums. See *Cornelius v. N.A.A.C.P., supra.*

C. Limiting the Uses of the Interiors of Terminal Facilities to Their Intended and Dedicated Airport-Related Purposes Only is Reasonable.

This Court has repeatedly stated that: "[p]ublic property which is not by tradition or designation a forum for public communication may be reserved by the state 'for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view.' " *City Council v. Taxpayers For Vincent, supra,* at pp. 814-815.

The decision to restrict access need not be the most reasonable or the only reasonable limitation. *Cornelius v. N.A.A.C.P., supra,* at p. 5121. When reviewing a limitation on access, this Court has recognized that the government operator of a non-forum facility must have sufficient latitude to make reasonable decisions and distinctions if it is to operate its facilities for their intended non-communicative purposes. *U.S. Postal Service v. Greenburgh Civic Assn., supra,* at p. 133; *Perry Ed. Assn. v. Perry Local Ed. Assn., supra,* at p. 49.

The interiors of the terminal facilities at Airport are not public forums and, therefore, Petitioners have a right to limit the uses of those facilities to their intended purposes. Petitioners have exercised this right by limiting

the activities within the terminal facilities to those that directly aid the traveling public. Petitioners urge this Court to find that such a limitation is reasonable.

A large number of groups and individuals wish to use the interiors of the terminal facilities at LAX to achieve their non-airport related objectives. (J.A. 15.) The reasonableness of and justification for the Policy must be analyzed with the recognition that Airport's functions would be seriously disrupted by the activities of all the groups who wish to use the terminal facilities to expound their views on a myriad of subjects. *Heffron v. ISKCON,* 452 U.S. 640, 652-653, 69 L.Ed.2d 298, 101 S.Ct. 2559 (1981); *City Council v. Taxpayers for Vincent, supra,* at p. 793; *Clark v. Community for Creative Non-Violence,* 468 U.S. ____, ____, 82 L.Ed.2d 221, 229, 104 S.Ct. ____ (1984). In addition, it is abundantly reasonable for Petitioners to exercise their right to restrict the uses of the facilities to their intended purposes rather than opening those facilities to all uses and waiting "until havoc is wreaked" before imposing any limitation on the uses of those facilities. *Cornelius v. N.A.A.C.P., supra,* at p. 5122, L.Ed. 585.

ARGUMENT

At issue in this case is the constitutionality of the Petitioners' Policy and practice of limiting the uses of the interiors of airport terminal facilities at Airport to airport-related activities only. Petitioners prohibit the use of the interiors of the terminal facilities for all non-airport related activities, including non-airport related activities that are protected by the First Amendment. Petitioners believe that it is entirely reasonable to limit the uses of the facilities under their control to their intended and dedicated airport-related purposes. Respondents, how-

ever, wish to use the interiors of the terminal facilities for their non-airport related, religious purposes.

The determinative issue in this case is whether the interiors of the terminal facilities at Airport are public forums. If the interiors of the terminal facilities are not public forums, those areas can be reserved for their intended purposes and any limitations on the use of those facilities need only be reasonable. If, however, the interiors of the terminal facilities are public forums, the Petitioners cannot reserve those facilities to their intended and dedicated purposes only but, instead, must allow protected, non-airport related activities (including Respondents' religious activities) to occur within the facilities limited only by "time, place and manner restrictions." Petitioners believe that the interiors of the terminal facilities at LAX are not public forums and that their Policy limiting the uses of those facilities to airport-related purposes only is entirely reasonable.

In deciding this case, it is also important to recognize what issues are not involved. This case does not involve censorship, prior restraints, discriminatory treatment or the review of a time, place and manner restriction. This case also does not involve a situation where Petitioners have used the interiors of the terminals to express their own views on a particular subject while prohibiting the expression of any contrary views. Furthermore, there is no claim that Petitioners' Policy was aimed at Respondents' particular views or that the Policy has been unevenly applied.

A. The Interiors of Terminal Facilities Are Not Traditional Public Forums

Traditional public forums are those places that "have immemorially been held in trust for use by the public and, time out of mind, have been used for purposes of assem-

bly, communicating thoughts between citizens, and discussing public questions." *Hague v. C.I.O., supra*, at p. 461. Traditional public forums are those places that by long tradition or by government fiat have been devoted to assembly and debate. *Perry Ed. Assn. v. Perry Local Ed. Assn., supra*, at p. 45. Generally speaking, open streets, sidewalks and parks are prime examples of public forums because of their historical association with and dedication to the exercise of expressive activities. *U.S. v. Grace, supra*, at p. 177. Not all streets and sidewalks, however, are traditional public forums. *Greer v. Spock, supra*, at pp. 836-837. Likewise, even government-owned or operated facilities that have a communicative purpose as a prime function are not necessarily traditional public forums. *U.S. Postal Service v. Greenburgh, supra*, at pp. 128-130. See also *Perry Ed. Assn. v. Perry Local Ed. Assn., supra*, at pp. 46-47.

In order to establish that a public facility is a traditional public forum, there must exist "a traditional right of access . . . for purposes of . . . communication comparable to that recognized for streets and parks . . ." *City Council v. Taxpayers for Vincent, supra*, at p. 814. Without such a right of access for communicative purposes, a government facility, particularly one dedicated to non-communicative purposes, will not become a traditional public forum. *U.S. Postal Service v. Greenburgh Civic Assn., supra*, at pp. 128-129.

Publicly owned property does not become a public forum simply because it is owned or controlled by the government. *U.S. Postal Service v. Greenburgh Civic Assn.*, 453 U.S. 114, 129, 69 L.Ed.2d 517, 101 S.Ct. 2676 (1981). The fact that the public is freely admitted to the property does not make a facility a public forum. *Greer v. Spock, supra*, at pp. 830, 838 and n. 10. Even occasional occurrences of speech or expressive activities within the facility

do not make that facility a traditional public forum. *Greer v. Spock, supra*, at p. 838, n. 10. See also *Perry Ed. Assn v. Perry Local Ed. Assn., supra*, at p. 47.

A principal purpose of a traditional public forum is the free exchange of ideas. *Cornelius v. N.A.A.C.P., supra*, at p. 5119, L.Ed.2d 578. The fact "that government property can be used as a vehicle for communication does not mean that the Constitution requires such uses to be permitted." *City Council v. Taxpayers for Vincent, supra*, at p. 814.

The purposes of an airport terminal are obviously to accommodate air transportation and to assist the traveling public. An airport does not have as a principal purpose, a long tradition of or a dedication to public assembly and debate. The exclusive purposes of LAX are to promote air navigation and to aid the traveling public. These exclusive purposes are mandated by the Charter. This government fiat requires the property to be used only for airport-related purposes unless there is a specific finding that the property is not needed for that purpose. (J.A. 9a, 10a.) Petitioners obviously believe that the interiors of the terminal facilities are needed for their transportation-related functions. The dedication and tradition of the terminal facilities are to intended airport-related activities and not to assembly for expressive purposes.

Respondents have attempted to prove that the interiors of the terminal facilities are traditional public forums by likening the physical characteristics of sidewalks to the interior hallways of the terminal facilities at Airport. (Brief in Opposition to Petition for Certiorari, p. 12.) If such a comparison between streets and hallways were all that was needed to transform a government facility into a traditional public forum, then most, if not all, hallways in government facilities would become traditional public forums.

It is not the physical similarities or dissimilarities to sidewalks and parks that are important in determining whether a particular place is a traditional public forum; rather, Respondents must establish that a particular facility has a traditional right of access for communicative purposes similar to that recognized in streets and parks. *City Council v. Taxpayers for Vincent, supra*, at p. 814. Respondents in this case have not shown any traditional right of access for communicative purposes and thus have not established that the interiors of the terminal facilities at Airport are traditional public forums. This conclusion is clearly supported by *Greer v. Spock, supra*, wherein this Court found that exterior sidewalk areas of a military base were not to be treated the same as a municipality's open streets and parks. The interiors of the terminal facilities at Airport clearly are even more distinguishable from those open sidewalks and parks that by long tradition have been devoted to assembly and debate than the areas involved in *Greer*. Without a traditional dedication to speech activities, a government facility clearly designed, dedicated and intended for non-communicative purposes is not a traditional public forum.

It is clear from the above discussion that the interiors of the airport terminal facilities at LAX, dedicated and used for their transportation functions, do not have a dedication to communications comparable to that recognized in open streets and parks. There is no traditional right of access to the terminal facilities at LAX for communicative purposes or for public debate. Airport is designed, dedicated and used solely for airport-related purposes and is clearly not a traditional public forum.

The Ninth Circuit erroneously concluded that the interiors of the terminal facilities at Airport are traditional public forums. The Ninth Circuit chose to ignore the clear principles set forth by this Court and to rely instead on

older, lower court cases that considered public ownership, public admission, and the fact that the terminal facilities at Airport could be used for communicative purposes in deciding whether a public forum at Airport existed. The Ninth Circuit's findings and Respondents' argument that the interiors of terminal facilities at LAX are traditional public forums fly in the face of the conclusions reached by this Court regarding traditional public forums.

B. Petitioners Have Not Opened the Interiors of the Terminal Facilities at Airport as Public Forums But, Rather, Have Reserved Them for Their Intended Purposes.

This Court has repeatedly recognized that "[t]he State, no less than a private owner of property, has the power to preserve the property under its control for the use to which it is lawfully dedicated." *Greer v. Spock, supra,* at p. 836; *Adderley v. Florida,* 385 U.S. 39, 48, 17 L.Ed.2d 149, 87 S.Ct. 242 (1966); *U.S. Postal Service v. Greenburgh Civic Assn., supra,* at p. 129; *Perry Ed. Assn. v. Perry Local Ed. Assn., supra,* at p. 46. No government is required to open all of its facilities for unrelated public expression. *U.S. v. Grace, supra,* at pp. 177-178.

The important factor in determining whether a government facility has been opened as a public forum is the intent of the government operator. *Cornelius v. N.A.A.C.P., supra,* at p. 5120, L.Ed.2d at p. 580. This intent is the key in distinguishing between a government facility that has been opened as a public forum and one that has been reserved for its intended purposes. This Court clearly has stated that "[t]he government does not create a public forum by inaction or by permitting limited discourse but *only by intentionally opening* a non-traditional public forum *for public discourse.*" *Cornelius v. N.A.A.C.P., supra,* at p. 5120, L.Ed.2d at p. 580. (Emphasis added.) In order to determine the government's in-

tent, the courts look to the government's policy and practice. *Perry Ed. Assn. v. Perry Local Ed. Assn., supra,* at p. 47. When necessary, the courts have looked at the nature of the facility and its compatibility with expressive activity in order to determine the government's intent. *Cornelius v. N.A.A.C.P., supra,* at p. 5120. This Court clearly explained, however, that "[w]e will not find a public forum has been created in the face of clear evidence of a contrary intent . . . " *Cornelius v. N.A.A.C.P., supra,* at p. 5120.

In this case, the government's intent could not be clearer. Airport property is to be used only for those activities that accommodate air commerce and air navigation. The Charter mandates that Airport be operated only for airport-related purposes. (J.A. 9a, 10a.) The Petitioners have adopted and reaffirmed a clear policy that requires the terminal facilities at Airport to be used for airport-related purposes only. (J.A. 11a, 17a.) Finally, Petitioners' practice has been to permit only those activities they believe directly aid the traveling public within the terminal facilities (J.A. 11a), and to deny all other uses. (J.A. 15a.) Thus, it is clear that the Petitioners intended to preserve and have preserved their property to its lawfully dedicated purposes and that Petitioners never intended to open nor ever have opened the terminal facilities at LAX for public discourse and debate.

The interiors of the terminal facilities at LAX are dedicated to their intended airport-related purposes. They are not dedicated to or designed for communicative purposes but, rather, are limited to the purposes of accommodating air transportation and aiding the traveling public. This Court has recognized that " . . . where government property is not dedicated to open communication the government may — without further justification — restrict use to those who participate in the forum's

official business." *Perry Ed. Assn. v. Perry Local Ed. Assn., supra,* at p. 53. [Fn. omitted.] Petitioners' Policy is not only legally permissible, it is also mandated by the Charter by which the Petitioners are governed.

Petitioners do not deny Respondents their right to use the interiors of the terminal facilities at LAX for airport-related purposes. Rather, Petitioners deny Respondents, and all others, the use of the interiors of the facilities for their particular non-airport related purposes. (J.A. 11a, 15a, 17a.) Restricting the uses of the interiors of a government facility, dedicated to non-communicative purposes, is constitutional and nothing more than an exercise of Petitioners' right to preserve their property to airport-related purposes only. See *Greer v. Spock, supra,* at p. 836; *Perry Ed. Assn. v. Perry Local Ed. Assn., supra,* at p. 46.

Regardless of Petitioners' clear Policy limiting the interiors of the terminal facilities to airport-related purposes only, Respondents argue that the facilities have been opened because Petitioners have permitted, or at least do not prohibit, certain activities protected by the First Amendment within the terminals.[1] (Brief in Opposition to Petition for Certiorari, pp. 13-14.) This argument is faulty for a variety of reasons. Most, if not all, of the activities cited by Respondents are obviously airport-related. When the nature and purpose of the activities are analyzed, it is abundantly clear that those activities are

---

[1]Respondents cite their use of the terminal facilities, art work decorating the terminals, an endangered species display, information booths, a reading room, and a picture of the City's Mayor as examples of First Amendment activities that have been permitted. (Brief in Opposition to Petition for Certiorari, p. 14.) In addition, Respondents cite the fact that the clothing individuals wear within the terminals has not been regulated and persons can walk through the terminals with various slogans on their clothing.

consistent with operating an airport and aiding the traveling public. Decorating a terminal, just like building a terminal, is airport-related even though art work may be protected by the First Amendment. Likewise, the existence of an "endangered species display" in the International Terminal with the admonition to "Think Before You Buy" is nothing more than a warning to the international traveler that the importation of certain goods made from endangered species is illegal. This is as clear an aid to the traveling public as are other signs within the terminals informing passengers of emergency exits, of regulations regarding explosives on airplanes, or of a myriad of other "do's and don'ts."

Providing information booths within the terminals, even though the information provided may be protected by the First Amendment, can hardly be viewed as a non-airport related activity or as an expression of the Petitioners' intent to open its facilities to religious, political or other non-airport related activities. Respondents' argument that the existence of a quiet reading room leased by the Christian Scientists within the terminals establishes an opening of the terminal facilities ignores the obvious fact that waiting areas are a necessary adjunct to a terminal facility. Thus, much of Respondents' recital of various activities that occur in the terminals and that could be deemed expressive is consistent with the airport uses for which the terminals were designed and to which they are dedicated.

Respondents also argue that people may enter the terminals wearing clothing imprinted with slogans and that Petitioners have not tried to prevent such activity, even though the person wearing the clothing may be trying to make a statement. (Brief in Opposition to Petition for Certiorari 14.) While it is true that Petitioners do not enforce a dress code within the terminal

facilities or examine a person's intentions when he or she wears clothing with a slogan, such inaction in this area could not by any stretch of the imagination be an example of the Petitioners' intent to open the interiors of the airport terminal facilities as public forums. Likewise, Respondents' prior use of the terminal facilities for distribution activity, without the express or implied consent of Petitioners (J.A. 15a), does not open the interiors of the terminal facilities as public forums because "[t]he government does not create a public forum by inaction or by permitting limited discourse but only by intentionally opening . . ." a facility as a forum for public discourse. *Cornelius v. N.A.A.C.P., supra*, at p. 5120.

Assuming arguendo that each of the activities cited by Respondents was a non-airport related expressive activity permitted by Petitioners, Respondents still have failed to show that the terminal facilities have been opened as public forums for their religious activities. *Perry Ed. Assn. v. Perry Local Ed. Assn., supra,* at p. 47, explains that there must be an opening of the facility for indiscriminate use by the general public. Here, just as in *Perry*, "[t]here is no court finding or evidence in the record which demonstrates that this permission [to use the system to communicate] has been granted as a matter of course to all who seek to distribute material." In this case, the record clearly establishes that permission to use the interiors of the terminal facilities at LAX for non-airport related purposes has been denied as a matter of course (J.A. 15a), and that, as a matter of course, only those activities that are believed to be airport-related are permitted. (J.A. 11a, 17.) The fact that some activities that could be deemed to be expressive activities have occurred in the terminals does not, by itself, convert those terminal facilities into public forums. *Greer v. Spock, supra*, at p. 838, n. 10. *Jones v. North Carolina Prisoners'*

Union, 433 U.S. 119, 134-135, 53 L.Ed.2d 629, 97 S.Ct. 2532 (1977).

Respondents' list of "expressive activities" that have occurred within the terminals cannot justify a finding that Petitioners intended to, or in fact did, open the interiors of those terminals as public forums. The "expressive activities" referred to by Respondents occur, in one form or another, in every building. If that were all that was necessary to convert a government facility dedicated to non-communicative purposes into a public forum, every government building would be a public forum and a government would never be able to restrict its facilities to their intended purposes.

C. It is Eminently Reasonable to Restrict the Use of the Interiors of Airport Terminals to Airport-Related Activities and to Exclude all Non-Airport Related Activities.

This Court has repeatedly recognized that: "[p]ublic property which is not by tradition or designation a forum for public communication may be reserved by the state 'for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view.' " *City Council v. Taxpayers for Vincent, supra*, at pp. 814-815. See also *Perry Ed. Assn. v. Perry Local Ed. Assn., supra*, at pp. 46, 50.

The interiors of the terminal facilities at LAX are not traditional public forums nor have they been opened as public forums. Therefore, any decision by the government operator to restrict the uses of the facilities need only be reasonable and not an attempt to suppress particular views.

Petitioners' Policy is not an attempt to suppress Respondents' particular views. Petitioners have uniformly

restricted the uses of the terminal facilities to airport-related activities and have denied permission to conduct a wide variety of activities involving various views that Petitioners believed were non-airport related. (J.A. 11a, 15a.) For example, Petitioners have denied permission to the Ford Motor Company, the Red Cross, Boy Scouts and Girl Scouts, sports foundations and a variety of religious and political groups to conduct non-airport related activities within the terminals. (J.A. 15a.)

The question, therefore, becomes whether or not it is reasonable to adopt and enforce a policy that restricts the use of the interiors of the terminal facilities at LAX to airport-related activities only and excludes all non-airport related activities, including non-airport related activities that are protected by the First Amendment.

Petitioners, as would any property owner, clearly have the right to limit the uses of their property to those to which it is lawfully dedicated. *Greer v. Spock, supra*, at p. 836; *Perry Ed. Assn. v. Perry Local Ed. Assn., supra*, at p. 46, and those cases cited in each. Petitioners, in adopting and enforcing their "airport-related activities only" Policy, are doing just what this Court has repeatedly stated is constitutionally permissible. Airport property is lawfully dedicated to its intended airport-related purposes. Petitioners are required to restrict the uses of that property to only those that promote and accommodate air commerce and navigation unless they can legitimately conclude that the property is not needed for airport-related purposes. (J.A. 9a-10a.) In both Policy and practice, Petitioners have operated the facilities under their control exclusively as an airport and not as a public forum for general assembly and debate. Petitioners urge this Court to find both the Policy and the practice reasonable.

Respondents assert that "Petitioners have failed to show that an absolute prohibition of First Amendment

activities is reasonable." (Brief in Opposition to Petition for Certiorari, p. 14.) This argument totally mischaracterizes Petitioners' Policy and the Policy that must meet the test of reasonableness.

The Petitioners' Policy can be briefly summarized as follows:

> "The Los Angeles International Airport shall be limited to airport-related uses only except that the sidewalk areas outside the terminal facilities may be used for activities protected by the First Amendment." (J.A. la-6a, 17a.)

In other words, no commercial activity is permitted anywhere on airport property unless it directly aids the traveling public and First Amendment activities are allowed only on the sidewalk areas outside the terminal facilities.

Respondents argue that Petitioners' Policy restricting the uses of the interiors of the terminal facilities to airport-related purposes only and denying Respondents access for religious purposes is unreasonable because "Petitioners have not shown how the exercise of First Amendment activity will in any way interfere with the airport-related purpose." (Brief in Opposition to Petition for Certiorari, p. 15.) Such an argument ignores this Court's teachings that ". . . where government property is not dedicated to open communication *the government may — without further justification — restrict* use to those who participate in the forum's official business." *Perry Ed. Assn. v. Perry Local Ed. Assn., supra,* at p. 52 [Fn. omitted, emphasis added.] See also *City Council v. Taxpayers for Vincent, supra,* at p. 4601, *U.S. Postal Service v. Greenburgh Civic Assn., supra,* at pp. 128-131.

Respondents seem to argue that "the exercise of First Amendment activity . . . is clearly compatible with airport

related functions . . ." and, therefore, the Policy limiting the uses of the terminal facilities to airport-related purposes only is unreasonable. (Brief in Opposition to Petition for Certiorari, p. 16.) Respondents also argue that some First Amendment activities have taken place in the terminals and that fact somehow establishes that the Policy restricting the facilities is unreasonable. (Brief in Opposition to Petition for Certiorari, pp. 16-17.)

These same arguments have been rejected by this Court in *Cornelius v. N.A.A.C.P., supra,* at p. 5121 and in *City Council v. Taxpayers for Vincent, supra,* at p. 814 and n. 31. In *Cornelius,* this Court clearly explained that:

> "The Government's decision to restrict access to a nonpublic forum need only be reasonable; it need not be the most reasonable or the only reasonable limitation. In contrast to a public forum, a finding of strict incompatibility between the nature of the speech or the identity of the speaker and the functioning of the nonpublic forum is not mandated." *Cornelius v. N.A.A.C.P., supra,* at p. 5121. See also *Perry Education Assn. v. Perry Local Educators' Assn., supra,* at p. 46.

In establishing this standard of reasonableness for nonforums, this Court has recognized that a government must have sufficient latitude to make reasonable business decisions if it is to operate its facilities for their intended non-communicative purposes. *U.S. Postal Service v. Greenburgh Civic Assn., supra,* at p. 133.

> ". . . Implicit in the concept of the nonpublic forum is the right to make distinctions in access on the basis of subject matter and speaker identification. These distinctions may be impermissible in a public forum but are inherent and inescapable in the process of limiting a nonpublic forum to activities compatible

> with the intended purpose of the property. The touchstone for evaluating these distinctions is whether they are reasonable in light of the purpose which the forum at issue serves." *Perry Ed. Assn. v. Perry Local Ed. Assn., supra*, at p. 49. [Fn. omitted.]

Furthermore, this Court has recognized that: ". . . regulations of a general character having uniform application throughout . . ." the facility are obviously necessary ". . . to operate as efficiently as possible a system . . ." or, in this case, an airport. *U.S. Postal Service v. Greenburgh Civic Assn., supra*, at p. 133; see also *Perry Ed. Assn. v. Perry Local Ed. Assn., supra*, at pp. 49-53.

This Court has consistently held that the "guarantees of the First Amendment have never meant 'that people who want to propagandize protests or views have a constitutional right to do so whenever and however and wherever they please.' " *U.S. Postal Service v. Greenburgh Civic Assn., supra,* at p. 133; *Greer v. Spock, supra*, at p. 836. See also *City Council v. Taxpayers for Vincent, supra*, at p. 791; *Heffron v. ISKCON*, 452 U.S. 640, 652-653, 69 L.Ed.2d 298, 309-310, 101 S. Ct. 2559 (1981). If the law were otherwise, all public facilities would "immediately become Hyde Parks open to every would-be pamphleteer and politician." *Perry Ed. Assn. v. Perry Local Ed. Assn., supra*, at p. 49, n. 9; *U.S. Postal Service v. Greenburgh Civic Assn., supra*, at p. 130, n. 6; *Lehman v. Shaker Heights*, 418 U.S. 298, 304, 41 L.Ed.2d 770, 778, 94 S.Ct. 2714 (1974).

A large number of groups and individuals wish to use the terminal facilities at LAX to achieve their non-airport related objectives. The reasonableness of and justification for the Petitioners' Policy must be analyzed with the recognition that the Airport's functions would be seriously disrupted by the activities of all the groups who wish to use the terminal facilities to expound their views

on a myriad of subjects. *Heffron v. ISKCON, supra*; *City Council v. Taxpayers for Vincent, supra*, at p. 793, *Clark v. Community for Creative Non-Violence*, 52 U.S.L.W. 4987, 4988; 468 U.S. ____, ____; 82 L.Ed.2d 221, 229; 104 S.Ct. ____ (1984).

Thus, it is submitted that limiting the uses of the terminal facilities at LAX to those that directly aid the traveling public is eminently reasonable, is not an attempt to suppress the Respondents' or anyone else's views, and is a legitimate exercise of the Petitioners' right to limit the uses of the interiors of the terminal facilities to those for which LAX was clearly designed, dedicated and intended.

CONCLUSION

Petitioners request that this Court reverse the judgment of the Court of Appeals and hold that the interiors of the terminal facilities at Los Angeles International Airport are not public forums and further that Petitioners' Policy restricting the uses of those facilities to airport-related activities only is constitutional.

Respectfully submitted,

JAMES K. HAHN, City Attorney
JAMES H. PEARSON, Senior
Assistant City Attorney
JAMES R. KAPEL, Assistant
City Attorney
Attorneys for Petitioners

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

On November 20, 1986, I served the within Brief for the Petitioners in re: "The Board of Airport Commissioners vs. Jews for Jesus, Inc." in the United States Supreme Court October Term 1986, No. 86-104;

on the Parties in said action, by placing three copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

Andrew Ekonomau
515 Rhodes Haverty Building
134 Peachtree Street N.W.
Atlanta, Georgia 30303

All Parties required to be served have been served

I certify (or declare), under penalty of perjury, that the foregoing is true and correct.

Executed on November 20, 1986, at Los Angeles, California Lawrence T. McManus

LAWRENCE T. McMANUS

Subscribed and Sworn to before me this 20th day of November, 1986.
My Commission Expires Feb 9 1990.

Cecilia Medina

Notary Public

No. 86-104 (12)

Supreme Court, U.S.
FILED
JAN 10 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

THE BOARD OF AIRPORT COMMISSIONERS OF THE CITY OF LOS ANGELES, *et al.*,
Petitioners,
v.
JEWS FOR JESUS, INC., *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENTS

JAY ALAN SEKULOW
60 Haight Street
San Francisco, California 94102
(415) 864-2600

WENDELL R. BIRD
1144 Monarch Plaza
3414 Peachtree Road, N.E.
Atlanta, Georgia 30326
(404) 264-9400

Of Counsel:
STUART J. ROTH
230 Peachtree Street
Atlanta, Georgia 30303
(404) 522-7188

ANDREW J. EKONOMOU
(Counsel of Record)
515 Rhodes-Haverty Building
134 Peachtree Street, N.W.
Atlanta, Georgia 30303
(404) 221-1000

BARRY A. FISHER
DAVID GROSZ
2049 Century Park East
Los Angeles, California 90067
(213) 557-1077

Attorneys for Respondents

BEST AVAILABLE COPY

78 pp

QUESTIONS PRESENTED

I. Does a Major Airport's Ban on "First Amendment Activities" Go Far Beyond Permissible Regulation of a Forum, under the Free Speech and Free Exercise Clauses of the First and Fourteenth Amendments?

A. Is LAX a Traditional Public Forum, Where Such a Ban Is Unconstitutional, in View of Its Similarity to Streets and Sidewalks and the Airport's Openness to the General Public, as Four Circuits Unanimously Have Held and as Other Airports Have Acknowledged?

B. If Not a Traditional Public Forum, Is LAX Still an Open Forum, Where Such a Ban Is Unconstitutional, in View of the Inapplicability of the Perry Test and the Airport's Openness to the General Public and Other Expressive Activities?

II. Does a Major Airport's Ban on "First Amendment Activities" Involve Impermissible Discretion Amounting to a Prior Restraint, under the Free Speech and the Free Exercise Clauses of the First and Fourteenth Amendments?

A. Does the Airport Ban Involve Impermissible Discretion for LAX Officials, Amounting to a Prior Restraint, in Determining Whether Activities Are "First Amendment Activities" and Whether They Are "Travel Related," as Exercised Arbitrarily in This Case?

B. Does the Airport Ban Involve Vagueness of Terms, Chilling Preferred Freedoms, in Referring to "First Amendment Activities" and "Airport Relatedness"?

III. Does a Major Airport's Ban on "First Amendment Activities" Embody Impermissible Content Discrimination and Religious Discrimination, under the Free Speech, Free Exercise,

Establishment, and Equal Protection Provisions of the First and Fourteenth Amendments?

A. Does the LAX Ban Constitute Content Discrimination against "First Amendment Activities" in Favor of Non-Expressive Activities, and Against Most Traditional First Amendment Expression in Favor of Allegedly Airport-Related Expression and Commercial Speech, without a Sufficient Justification for Such Content Discrimination?

B. Does the Airport Ban Constitute Religious Discrimination against Other Religions in Favor of the Christian Science Religion?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	vi
STATEMENT OF THE CASE	1
SUMMARY OF THE ARGUMENT	6
ARGUMENT	9
I. A MAJOR AIRPORT'S BAN ON "FIRST AMENDMENT ACTIVITIES" GOES FAR BEYOND PERMISSIBLE REGULATION OF A FORUM, UNDER THE FREE SPEECH AND FREE EXERCISE CLAUSES OF THE FIRST AND FOURTEENTH AMENDMENTS.	9
A. *LAX Is a Traditional Public Forum, Where Such a Ban Is Unconstitutional.*	9
1. Traditional Public Forums Are Not Limited to Streets and Parks.	9
2. A Major Airport Is a Traditional Public Forum, Because It Is Very Similar to Streets and Sidewalks, and Very Different From Limited Forums.	11
a. General Public Access and Commerce	11
b. Other First Amendment Activities	11
c. Contrast to Limited Forums and Non-Forums	13
3. A Major City Airport Is One of the Primary City Gates, Which by Tradition and by Function Are Traditional Public Forums.	15
a. Classical City Gates	15
b. Historical Transportation Gateways	15
c. Major Airports	16

4. Major Airports Have Been Treated by Lower Court Decisions Almost Uniformly as Traditional Public Forums. 17
a. Four Circuits' Unanimous Decisions on Airports 17
b. California Decisions on LAX 20
c. FAA Regulations 23
5. No Justification Has Been Shown by LAX, Either by Compelling Interest or Least Restrictive Means, for the Airport Ban on "First Amendment Activities." . 23
a. No Compelling Interest 23
b. No Least Restrictive Means 26
B. *If Not a Traditional Public Forum, LAX Is Still an Open Forum, Where a Ban on First Amendment Activities Is Unconstitutional.* 28
1. The *Perry* Test Is Neither an Exclusive Test Nor Applicable to LAX. 28
a. Nonexclusive 28
b. Inapplicable 29
2. Even If Applicable, the *Perry* Test Invalidates the Ban on "First Amendment Activities." 30
a. The CTA at LAX Has Been "Opened" for Expressive Activities. 30
b. The Resolution Is Impermissible 33
II. A MAJOR AIRPORT'S BAN ON "FIRST AMENDMENT ACTIVITIES" INVOLVES IMPERMISSIBLE DISCRETION AMOUNTING TO A PRIOR RESTRAINT, UNDER THE FREE SPEECH AND THE FREE EXERCISE CLAUSES OF THE FIRST AND FOURTEENTH AMENDMENTS. 34
A. *The Airport Ban Involves Impermissible Discretion for LAX Officials, Amounting to*

a Prior Restraint, in Determining Whether Activities Are "First Amendment Activities" and Whether They Are "Travel Related." 34

1. Official Discretion Whether To Permit or Ban First Amendment Activities Is a Prior Restraint. 34

2. LAX Officials Hold and Have Exercised Such Impermissible Discretion. 39

B. *The Airport Ban Involves Vagueness of Its Terms, Chilling Preferred Freedoms, in Referring to "First Amendment Activities" and "Travel Relatedness."* 40

III. A MAJOR AIRPORT'S BAN ON "FIRST AMENDMENT ACTIVITIES" EMBODIES IMPERMISSIBLE CONTENT DISCRIMINATION AND RELIGIOUS DISCRIMINATION, UNDER THE FREE SPEECH, FREE EXERCISE, ESTABLISHMENT, AND EQUAL PROTECTION PROVISIONS OF THE FIRST AND FOURTEENTH AMENDMENTS. 41

A. *The LAX Ban Constitutes Content Discrimination against "First Amendment Activities" in Favor of Non-Expressive Activities, and against Most Traditional First Amendment Expression in Favor of Allegedly Airport-Related Expression and Commercial Speech.* 42

1. The Ban Constitutes Content Discrimination. 43

2. Such Content Discrimination Is Unjustified. 45

B. *The Airport Ban Constitutes Religious Discrimination against Other Religions in Favor of the Christian Science Religion.* . . 46

1. The Ban Constitutes Religious Discrimination. 46
2. Such Religious Discrimination Is Unjustified. 47
CONCLUSION 47
APPENDICES ..... Ai
A. *City of Los Angeles Charter (Excerpts)* ... A-1
B. *Resolution No. 13787 (Excerpts)* A-2
C. *Opinion of the United States Court of Appeals for the Ninth Circuit* A-4
D. *Opinion of the United States District Court* A-13
CERTIFICATE OF SERVICE A-19

TABLE OF AUTHORITIES

A. Court Decisions

ACLU v. Ginty, No. C-2-251 (1977) 19
Adderley v. Florida, 385 U.S. 39 (1966) 13
Arsenalt v. State, No. 75-18473 (1975) 20
Ashwander v. TVA, 297 U.S. 288 (1936) 22
Baktapriva v. Trusel, No. C177985 (1976) 22
Bonaccurso v. City of Los Angeles, No. C274022 (1979) 22
Brashick v. Port Authority, 484 F.Supp. 697 (S.D. N.Y. 1979), *aff'd mem.*, 628 F.2d 1344 (2d Cir. 1980) 17
Brown v. Louisiana, 393 U.S. 131 (1966) 9
Carey v. Brown, 447 U.S. 455 (1980) 25, 28, 45
Carreras v. City of Anaheim, 768 F.2d 1039 (9th Cir. 1985) 22
Canada v. Canada, 1 F.T.R. 71 (Fed. Cir. 1986) .. 23
Chicago Area Military Project v. City of Chicago, 508 F.2d 921 (7th Cir.), *cert. denied*, 421 U.S. 992 (1975) 19
City of Cleburne v. Cleburne Living Center, 105 S. Ct. 3249 (1985) 33
City of Los Angeles v. ISKCON, No. C 270320 (1979) 22
City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283 (1982) 22
Cornelius v. N.A.A.C.P. Legal Defense & Education Fund, 105 S. Ct. 3439, 3450 (1985) 13, 14, 29, 32, 33
Edwards v. South Carolina, 372 U.S. 131 (1966) 9, 13
Fernandes v. Limmer, 663 F.2d 619 (5th Cir. 1981) 18, 19, 26, 27
Goldman v. Weinberger, 106 S. Ct. 1310 (1986) .. 15
Greer v. Spock, 424 U.S. 828 (1976) 14
Hague v. CIO, 307 U.S. 496 (1939) 9, 35, 36, 38

Heffron v. International Society for Krishna Consciousness, 452 U.S. 640 (1981) 9, 26, 29
Holtzman v. Davis, No. C187786 (1977) 22
ISKCON v. Adlum, No. C-75-4015 (1978) 19
ISKCON v. Andersen, No. Civ. 76-0-388 (1977) .. 20
ISKCON v. Bosquez, Civ. No. SA-76-CA-189 (1976) 20
ISKCON v. City of Los Angeles, No. CV-83-5229-ER (June 29, 1984) 22
ISKCON v. City of St. Louis, No. 70509-F (Apr. 2, 1979) 19
ISKCON v. Collins, 452 F. Supp. 1007 (S.D. Tex. 1977) 19
ISKCON v. Cunningham, Civ. No. 76-563 (1976) . 19
ISKCON v. Davis, No. C 104943 (1974) 22
ISKCON v. Eaves, 601 F.2d 809 (5th Cir. 1979) .. 20
ISKCON v. Engelhardt, 425 F. Supp. 176 (W.D. Mo. 1977) 19
ISKCON v. Fillis, No. C-75-443 (1976) 19
ISKCON v. Flesch, No. 76-69 (1978) 20
ISKCON v. Garey, No. C-75-705 (1975) 19
ISKCON v. Hynes, No. 75-9421 (1976) 19
ISKCON v. Lamb, No. CIC-LV-75-88-RDF (1975) 19
ISKCON v. Lentini, 461 F. Supp. 49 (E.D. La. 1978) 19
ISKCON v. Massachusetts Port Auth., No. 75-3468 (1975) 20
ISKCON v. Mercado, No. 76-8 (1976) 20
ISKCON v. Pixley, No. CIV 4-75-631 (1976) 20
ISKCON v. Rochford, 585 F.2d 263 (7th Cir. 1978) 20
ISKCON v. Sorenson, No. 190090 (1975) 19
ISKCON v. Stover, CIV-76-486M (1976) 19
ISKCON v. Waser, No. C-77-107 (1979) 20
ISKCON v. Wetzel, No. Civ. 75-450 PHX WPC (1975) 19
ISKCON v. Wolke, 453 F. Supp. 869 (E.D. Wis. 1978) 19

Jamison v. Texas, 318 U.S. 413 (1943) 9, 14, 36, 39
Kuszynski v. City of Oakland, 479 F.2d 1130 (9th Cir. 1973) 18
Lehman v. City of Shaker Heights, 418 U.S. 298 (1974) 13, 18
Madison Joint School Dist. v. Wisconsin Employment Relations Comm'n, 429 U.S. 167 (1976) 25, 42
Mahoney v. Cook, Civ. No. C-4778 (1975) 19
Marsh v. Alabama, 326 U.S. 501 (1946) 10, 36
Members of City Council v. Taxpayers for Vincent, 466 U.S. 789 (1984) 13, 29
Minnesota State Board for Community Colleges v. Knight, 465 U.S. 271 (1984) 13
Niemotko v. Maryland, 340 U.S. 268 (1951) 8, 9, 35, 36, 39, 46
People v. Fogelson, 21 Cal. 3d 158, 577 P.2d 677, 145 Cal. Rptr. 542 (1978) 21
People v. Hawk, No. 823569 (1976) 21
People v. Mendoza, No. 752864 (1976) 21
Perry Education Association v. Perry Local Educators Association, 460 U.S. 37 (1983) 7, 13, 14, 26, 28, 29, 30, 33
Plyler v. Doe, 457 U.S. 202 (1982) 33
Pruneyard Shopping Center v. Robins, 447 U.S. 74 (1980) 21
Robins v. Pruneyard Shopping Center, 23 Cal. 3d 854 592 P.2d 341, 153 Cal. Rptr. 854 (1979) 21
Rostker v. Goldberg, 453 U.S. 57 (1981) 15
Schneider v. State, 308 U.S. 147 (1939) 13, 37, 39
Siler v. Louisville & N.R., 213 U.S. 175 (1909) 22
Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969) 9
United States v. Grace, 461 U.S. 171 (1983) 6, 9, 14

United States Postal Service v. Council of Greenburgh Civic Associations, 453 U.S. 114 (1981) 6, 13, 29
United States Southwest Africa/Namibia Trade & Cultural Council v. United States, 708 F.2d 760 (D.C. Cir. 1983) 18, 30
Wolin v. Port of New York Authority, 392 F.2d 83, 80 (2d Cir.), *cert. denied*, 393 U.S. 940 (1968) 10, 12, 18
Widmar v. Vincent, 454 U.S. 263 (1981) 30, 33, 45, 46, 47
Wilson v. Superior Court (1975) 21

B. Statutes and Ordinances

LAX Board of Airport Comm'rs. Res. No. 13787 . 1
Los Angeles City Charter 4
FAA Regs., 14 C.F.R. § 159-93 ..... 23, 27

C. Other Authorities

W. ANDERSON & R. SPIERS, THE ARCHITECTURE OF GREECE AND ROME 192-93, 226-30 (1907) 10
Airport Shopping Spree, FLYING TIMES, Nov./Dec. 1986, at 3-6 16
Bible 15
H. CONWAY, THE AIRPORT CITY (1977) 16, 17
I.J. FORLONG, ENCYCLOPEDIA OF REGIONS 49 (1964) 15
P. Goldberger, *Design Notebook*, New York Times, Mar. 23, 1978 17
J. KEMBLE, SAN FRANCISCO BAY: A PICTORIAL MARITIME HISTORY 16 (1957) 16
K. LYNCH, GOOD CITY FORM 208 (1981) 17
K. LYNCH, THE IMAGE OF THE CITY 74-75 (1960) .. 16
Kalven, *The Concept of Public Forum*: Cox v. Louisiana, 1965 S. CT. REV. 1 ..... 10, 12
H. MELVILLE, MOBY DICK, OR THE WHALE (Library of America ed. [1st ed. 1851]) 15
Trial Br. of Plaintiffs and Counterdefendants at 39-45 22

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

THE BOARD OF AIRPORT COMMISSIONERS
OF THE CITY OF LOS ANGELES, *et al.*,
Petitioners,

v.

JEWS FOR JESUS, INC., *et al.*,
Respondents.

STATEMENT OF THE CASE

Airport Ban. On July 13, 1983, the Board of Airport Commissioners ("Board") enacted Resolution No. 13787 ("Resolution"), which banned all "First Amendment activities" from the interior of the Central Terminal Area ("CTA") at Los Angeles International Airport ("LAX"). (J.A. 18a, para. 64.) (*See* Appendix A for the enabling provisions of the city charter, and Appendix B for the Resolution.) In adopting the resolution, the Board directed the city attorney of the City of Los Angeles to institute "appropriate litigation" against individuals or entities that engage in First Amendment activities within the CTA at LAX. (J.A. 5a.) The CTA at LAX is open to members of the general public without restriction, regardless of their intent or desire to utilize the transportation related facilities. (J.A. 13a, para. 31.)

First Amendment Activities. During at least the past ten years, a variety of religious and political groups, including Jews for Jesus,* have utilized the interior area of the terminals at LAX, including the "pedestrian walkways"[1] located

---

* Jews for Jesus, Inc. is a California non-profit religious corporation, with no parent companies and no subsidiaries. Jewish Christian Ministry of Reconciliation and A Messianic Jewish Perspective are affiliates of Jews for Jesus, Inc.

1. "Pedestrian walkways" at LAX, unlike some airports, refers to broad corridors within airport buildings, rather than moving sidewalks or similar narrower areas.

within it, to distribute literature and communicate ideas. (J.A. 11a, para. 22.) Neither the Board nor Jews for Jesus is aware of any occasion in which a member of Jews for Jesus, while engaged in the free distribution of religious literature in the pedestrian walkways of LAX, has intentionally harassed, interfered with, blocked, obstructed, physically touched in an offensive manner, or otherwise intentionally annoyed any other person. (J.A. 18a, para. 63.)

Jews for Jesus is an evangelical organization whose purpose is to present the gospel of Jesus particularly to Jews although to Gentiles as well. In contrast to cults, Jews for Jesus works with various evangelical missions and evangelical churches, and presents the historic gospel in much the same way as the early church (which in its first decades consisted mostly of Jews) did in Jewish synagogues and to Jewish individuals. Distribution of free religious literature in public places is an integral part of its religious mission, just as it was for early Jewish believers in Jesus.

On July 6, 1984, Alan Snyder ("Snyder"), a minister with Jews for Jesus, was stopped while distributing free religious literature prepared by Jews for Jesus, on a pedestrian walkway in the CTA at LAX. (J.A. 19a, para. 67.) A uniformed peace officer approached Snyder, handed him a copy of the resolution, and warned him that if he did not cease his distribution of religious literature within the terminal, the city would take legal action against him. (J.A. 19a, para. 69.)

While he was distributing the religious literature, Snyder was courteous, and he was not blocking any entrances, exits, stairways, escalators, elevators, doors, or otherwise inhibiting the free flow of pedestrian traffic on the pedestrian walkway located inside the terminal. (J.A. 19a, para. 67.) In keeping with the express policy of Jews for Jesus, Snyder did not solicit or accept any contributions. (J.A. 18a, para. 61.) Nevertheless, as the peace officer had demanded, Snyder stopped his distribution of literature and left the terminal. (J.A. 19a-20a, para. 69.)

LAX and CTA Structure. LAX is the third busiest airport in the world. It was anticipated that in 1984 LAX would handle more than 34 million passengers. It is estimated that at least an equal number of greeters enter the terminal area to pick up or drop off airline passengers. (J.A. 9a, para. 10.)

The CTA at LAX contains the terminal facilities, parking structures, and a series of private streets and roadways which provide vehicular access. (J.A. 7a, para. 4.)

Each of the terminal facilities contains large areas open to the public including the pedestrian walkways, ticketing and baggage claim areas, baggage lockers, check in gates, loading gates, restaurants, newsstands, gift shops, barber shops, art displays, information displays, flight insurance counters, rent-a-car counters, hotel, motel, restaurant and ground transportation advertising displays, rest areas, including chairs and benches, restrooms, automatic traveler's check and banking machines, general waiting areas (J.A. 7a, para. 4), and a Christian Science Reading Room in one of the terminals. (J.A. 20a-21a, para. 74.) The public is permitted unrestricted access to these portions of the CTA. (J.A. 8a, para. 5.)

Airport Discrimination toward Non-Commercial Speech. The total ban on First Amendment activities in the CTA does not extend to the Christian Science Reading Room (J.A. 20a, para. 74), and newsstands (J.A. 11a, para. 18), or to sales counters, hotel and transportation displays, and so forth. (J.A. 7a, para. 4.) The Christian Science Reading Room is open to the public and displays religious literature pertaining to the Christian Science faith. (J.A. 20a-21a, para. 74.) The monthly rental paid for the leased space occupied by the Christian Science Reading Room is $510.00. It has been in operation inside the terminal building for twenty years. (J.A. 21a, para. 74.)

Similarly, the total ban on First Amendment activities does not extend to anyone wishing to exercise First Amendment rights on the sidewalks outside the front of the terminal buildings. However, approximately 25% of the passengers do

not use the sidewalk area in front of the terminal facilities because at least this number of passengers neither commence nor terminate their flight travels at LAX. (J.A. 9a, para. 15.) Thus, a substantial number, nearly 8,500,000 passengers, cannot be reached by First Amendment activities restricted to the sidewalks.

The Board has allowed the interior of the terminal areas, including the wide pedestrian walkways, to be utilized by print, television and radio media for purposes of filming, photographing, and interviewing public figures. (J.A. 12a, para. 25.) The Board has expressly permitted the display of art work created by children in the terminal facilities. (J.A. 12a, para. 28). The Board does permit First Amendment activity in the form of slogans and statements imprinted on T-shirts or other articles of clothing. (J.A. 13a, para. 32.)

Airport Discrimination in Favor of Commercial Speech. Under the Los Angeles City Charter[2] (*see* Appendix A), the Board has the power to enter into leases for purposes *other than* for the promotion and accommodation of air commerce and air navigation covering any portion of the airport property, whenever the Board determines that the use of a portion of the airport property is not necessary for the promotion and accommodation of air commerce and air navigation or uses incidental thereto. (J.A. 10a, para. 16.)

The general manager has the power[3] to issue revocable permits to use limited portions of the airport facilities *for any and all purposes* that do not interfere with air commerce or air navigation and that are not inconsistent with any trust upon which such land may be held by the City of Los Angeles. (J.A. 10a, para. 17.) The Board has expressly allowed the exercise of commercial speech in the interior terminal areas of LAX in the form of advertising displays in connection with hotel, motel, restaurant, and ground transportation and other services offered by commercial vendors. (J.A. 14a, para. 33.) Immediately prior to and during the 1984 Summer Olympic

2. Art. XXIV, § 238.8.
3. *Id.* art. XXIV, § 239.5.

Games in Los Angeles, "Olympic Family" booths, providing information to athletes and Olympic officials, were set up with the express consent of the Board within the terminal areas at LAX. (J.A. 14a, para. 36.)

The Los Angeles Department of Airports ("Department"), which operates LAX under the direction and control of the Board, has entered into permits, license agreements, leases, and concession agreements to provide newspapers and books, food and beverage service, gift facilities, ground transportation, waiting areas, ticket counters, lockers, and baggage facilities. (J.A. 11a, para. 18.) A picture of the Mayor of the City of Los Angeles is displayed in each of the terminals on a sign that states "Mayor Tom Bradley Salutes the New LAX—Gateway to the Olympics." (J.A. 12a, para. 27.) A display entitled "Think Before You Buy" containing specimens, pictures, and information pertaining to protected species is also expressly permitted by the Board. (J.A. 12a, para. 29.) A display depicting photographs of various athletes and containing the message, "Photographs of American Olympic Hopefuls Sponsored by the Reach for the Gold Foundation with a grant from Fuji Film U.S.A., Inc.," was constructed and maintained inside the terminal at LAX for approximately two or three weeks in 1984. (J.A. 13a, para. 30.)

Purported Justification for Resolution. The Board's proposed justification is "to limit use of the terminal facilities to those uses which *it believes directly aid* the traveling public." (J.A. 11a, para. 20, emphasis added.) Based on the foregoing facts, the Board has failed to demonstrate a significant danger of substantially greater congestion than already exists, or of any interference with air commerce and incidental uses, or of danger to passengers, from "First Amendment activities" such as those of Jews for Jesus and Snyder. This is particularly true of those First Amendment activities that do not involve solicitation or acceptance of contributions, as is the express policy of Jews for Jesus. On the contrary, the Board has experienced no problems arising from the First Amendment activities of the Christian Science Reading Room, the news-

stands, or commercial speech activities that the airport permits, and the First Amendment activities that the airport tolerates on its sidewalks.

History of Litigation. On July 17, 1984, Jews for Jesus and Snyder filed a complaint in the United States District Court for the Central District of California seeking declaratory relief that the resolution was unconstitutional and enjoining its enforcement. Jews for Jesus also sought attorney's fees and costs incurred in connection with the suit.

On March 25, 1985, the district court ruled in favor of Jews for Jesus. The basis for the ruling was that LAX was a public forum and that the resolution was unconstitutional. (*See* Appendix D for full text of the opinion.)

On March 25, 1986, the United States Court of Appeals for the Ninth Circuit affirmed. The panel unanimously held that the Board's resolution was unconstitutional and that the CTA at LAX was a traditional public forum, and awarded reasonable attorneys' fees. (*See* Appendix C for full text of the opinion.)

SUMMARY OF THE ARGUMENT

1. *Major Airports Are Public Forums That Are Open for First Amendment Activities.* The extent to which the government must permit access by the public for expressive activity to a publicly owned place depends upon the nature of the particular place. Streets, parks, sidewalks, and other public thoroughfares lie at one end of the spectrum. In these places, the government's power to limit expression is sharply circumscribed. *United States v. Grace*, 461 U.S. 171, 177 (1983).

Major airport terminals are thoroughfares opened at all times to unrestricted public access, and as such are traditional public forums. They are close indeed to the "quintessential public forums" of streets, sidewalks, and parks—distinguishable primarily by being covered. Airport terminals bear little relevant resemblance to military bases or mailboxes, which by necessity are enclaves set apart from general access. *Greer v. Spock*, 424 U.S. 328 (1976); *United States Postal Service v. Council of Greensburgh Civic Associations*,

453 U.S. 114 (1981). There are, no doubt, areas in an airport where there is a special interest in limiting or prohibiting access. It does not follow, however, that access may be entirely excluded as the Board's resolution purports to do. There is no compelling interest in banning all "First Amendment activities" everywhere in a major airport. Moreover, the ban of all First Amendment activities from the interior of the CTA at LAX is not the least restrictive means by which the Board could achieve its desired purpose. To the contrary, the resolution is the most restrictive means imaginable to accomplish any conceivable state interest.

The Board's own practice and policy has unequivocally opened the CTA at LAX for indiscriminate use by the general public, even if it is not a traditional public forum. Public property which the government opens, for use by the public for expressive activity, becomes a designated or open public forum from which the state may not limit activity absent a compelling state interest. *Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37 (1983). Not only is the general public allowed unrestricted access to the CTA at LAX, but wide ranges of commercial First Amendment activities, as well as many pure First Amendment activities, take place within the CTA. During the past ten years, a variety of religious and political groups, including Jews for Jesus, have utilized the interior area of the terminals at LAX, to distribute literature and communicate ideas. (J.A. 11a, para. 22.) The CTA is lined with newsstands, as well as a Christian Science Reading Room, and is the site of political speeches and press interviews, as well as informative signs and commercial speech, all of which show the Board's intent in unequivocally opening the CTA to expressive First Amendment activities.

The resolution's sweeping ban on First Amendment activities inside the CTA at LAX is so unreasonable that it cannot pass constitutional scrutiny. Its justification is purportedly to preserve the airport for airport-related uses. Yet, the record is devoid of any evidence showing that the "First Amendment

activities" of Jews for Jesus or similar groups interfered with the airport-related uses the Board seeks to preserve. To the contrary, the Board concedes that the very activities that prompted this action did not interfere with the airport's operation. (J.A. 19a, para. 67.)

II. *LAX's Ban on "First Amendment Activities" Involves Impermissible Discretion and Is Vague.* In many decisions, "this Court condemned statutes and ordinances which required that permits be obtained from local officials as a prerequisite to the use of public places, on the grounds that a license requirement constituted a prior restraint on freedom of speech, press and religion, and, in the absence of narrowly drawn, reasonable and definite standards for the officials to follow, must be invalid." *Niemotko v. Maryland*, 340 U.S. 268, 271 (1951). *Accord, e.g., Kunz v. New York*, 340 U.S. 290, 293, 294 (1951). The Board retains precisely that sort of discretion, without narrowly drawn or definite standards, in permitting or excluding certain First Amendment activities. It may use the "airport-related" tag to justify any permission, and the "non-airport-related" tag to justify any denial, with no governing standard at all. Thus, the Board arbitrarily allows the Christian Science Reading Room, numerous newsstands, an endangered species display, press interviews and political speeches, and general public access, while disallowing Jews for Jesus from the CTA. Incredibly, the Board sees no problem with "non-First Amendment activities" or commercial speech, and subordinates pure "First Amendment activities" to them. As such broad discretion implies, the Board's resolution is impermissibly vague.

III. *LAX's Ban on "First Amendment Activities" Embodies Impermissible Content Discrimination and Religious Discrimination.* "Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say. Selective exclusions from a public forum may not be based on content alone . . .." *Police Department v. Mosley*, 408 U.S. 92, 95-96 (1972). The Board has done ex-

actly that sort of content discrimination, not only between nonexpressive activities and "First Amendment activities," but between allegedly airport-related and other "First Amendment activities," and between commercial speech and "First Amendment activities." Literature distribution by Jews for Jesus and other First Amendment activities do not threaten any compelling interest, and the Board has not attempted to serve its interests by the least burdensome means or by narrowly drawn means.

Moreover, the Board has brought about religious discrimination between the Christian Science Reading Room and other religions.

ARGUMENT

I. A MAJOR AIRPORT'S BAN ON "FIRST AMENDMENT ACTIVITIES" GOES FAR BEYOND PERMISSIBLE REGULATION OF A FORUM, UNDER THE FREE SPEECH AND FREE EXERCISE CLAUSES OF THE FIRST AND FOURTEENTH AMENDMENTS.

A. LAX Is a Traditional Public Forum, Where Such a Ban Is Unconstitutional.

1. *Traditional Public Forums Are Not Limited to Streets and Parks.*

Certainly streets and parks are traditional public forums where First Amendment exercises may not be banned. *E.g.*, *Hague v. C.I.O.*, 307 U.S. 496 (1939); *Jamison v. Texas*, 318 U.S. 413 (1943); *Niemotko v. Maryland*, 340 U.S. 268 (1951). That list is not exhaustive, however, because state capital grounds and sidewalks are similarly traditional forums. *E.g.*, *Edwards v. South Carolina*, 372 U.S. 131 (1966); *United States v. Grace*, 461 U.S. 171 (1983). This Court has also recognized limited public forums including state fairs, *Heffron v. International Society for Krishna Consciousness*, 452 U.S. 640 (1981), school grounds, *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), and public libraries, *Brown v. Louisiana*, 393 U.S. 131 (1966). The "concept of the public forum," to use Professor Kalven's

phrase, by its nature can be neither monolithic nor static.[4] Over a period of time, the places that will constitute public forums must change.

The presence of a roof does not necessarily transform a traditional public forum into something else.[5] A public street or park would not lose its character as a forum because of physical incidents such as being covered, just as access to a downtown street may, for example, not be prohibited because of the legal incident that title to the entire downtown has been transferred to a private entity. *Marsh v. Alabama*, 326 U.S. 501 (1946). Places such as a middle eastern market, or a street like the arcades of Paris and London, or the Galleria Vittorio Emanuele II of Milan, would, were they to be transplanted into an American city, doubtless be "quintessentially public forums." Indeed, the historical places from which the modern metaphor of "forum" derives were often enclosed spaces. The Roman basilicas traditionally adjacent to the forum itself were large, usually roofed, public structures containing markets, courthouses, covered promenades, and meeting halls.[6] In the Greek agora, the roofed stoas housed small shops and stores and provided the citizens with an ideal place to meet and exchange views.[7]

---

4. Kalven, *The Concept of Public Forum*: Cox v. Louisiana, 1965 S.Ct. Rev. 1.

5. The "mere presence of a roof plainly does not render a place inappropriate for expression." Wolin v. Port Authority of New York, 392 F.2d 83, 89 (2d Cir.), *cert. denied*, 393 U.S. 940 (1968):

> The privacy and solitude of residents may require that apartment house hallways be insulated from the excitement of volatile exhortations, or the quiet dignity of judicial administration may dictate that court house passages be kept free of demonstration. But that is a result based on wisdom and experience because the abrasions caused by any protected speech would too greatly interfere with other interests . . . and not simply because there is a covering on the building.

See also Hudgens v. NLRB, 424 U.S. 507 (1976), wherein this Court held that a shopping mall is not a forum only because it is privately owned.

6. *See* W. Anderson & R. Spiers, The Architecture of Greece and Rome 192-93, 226-30 (1907).

7. *See id.* at 136-39; W. Rinsmoon, The Architecture of Ancient Greece 240-241, 262-64 (3d ed. 1950).

2. *A Major Airport Is a Traditional Public Forum, Because It Is Very Similar to Streets and Sidewalks, and Very Different from Limited Forums.*

a. *General Public Access and Commerce.* The Los Angeles International Airport (LAX) is the third busiest airport in the world. In 1984 it handled about 34 million passengers and at least another 34 million "meeters and greeters." (J.A. 9a, para. 10.)

It has eight terminal buildings (J.A. 7a, para. 4), to all of which the public has unrestricted access. (J.A. 8a, para. 5.) Thus, access is not limited to the 68 million yearly (more than 180,000 daily) travelers and "meeters and greeters." The remainder of the public enjoys plenary use of the terminal buildings for such ordinary pursuits as walking, reading, shopping, eating, drinking, and conversing. (J.A. 13a, para. 31.) Furthermore, no charge is imposed for any such entry or use. (J.A. 16a, para. 46.)

At least 8.5 million passengers each year, more than the entire population of New York City, do *not* use the sidewalk area in front of the terminal at all (J.A. 9a, para. 15), and thus spend their time at LAX literally within the confines of the buildings themselves. The public forum at LAX must include the terminal buildings where 68 million people congregate annually.

b. *Other First Amendment Activities.* The terminal buildings, lined with wide pedestrian walkways, encompass such First Amendment activities as a Christian Science Reading Room (J.A. 20a-21a, para. 74), art displays, information displays, and newsstands (J.A. 7a-8a, para. 4), as well as slogans and statements on T-shirts and other clothing. (J.A. 13a, para. 32.) The CTA also provides for commercial speech in the form of numerous shops, locations for insurance, car rental, banking, and rest areas. (J.A. 7a-8a, para. 4.) A picture and endorsement of LAX from the Mayor of Los Angeles adorns each of the terminal buildings, and reads "Mayor Tom Bradley Salutes the New LAX—Gateway to the Olympics,"

thereby making clear its public nature and its governmental sponsorship. (J.A. 12a, para. 27.)

Although the Board purports to have "attempted to limit the use of the terminal facilities to those uses which it believes directly aid the traveling public" (J.A. 11a, para. 2a), this effort has been neither consistent nor truly serious. For at least ten years, a variety of religious and political groups have used the terminal buildings to distribute literature, solicit funds, and communicate ideas. (J.A. 4a, para. 21.) During this period, Jews for Jesus and Snyder distributed free religious literature within the terminal. (J.A. 15a, para. 41.) Indeed, the print, television, and radio media have utilized the CTA at LAX for the purpose of interviewing public figures, such as political candidates, the Mayor of Los Angeles, and the Chairman of the Olympic Organizing Committee. (J.A. 12a, para. 25.)

Thus, the CTA at LAX, like the Port Authority Bus Terminal in New York, constitutes a "thoroughfare used by thousands of people each day," and is "so vast" and complex that it has "become something of a small city—but built indoors." *Wolin v. Port of New York Authority*, 392 F.2d 83, 89 (2d Cir. 1968), *cert. denied*, 393 U.S. 940 (1968). In both their purpose (transportation) and their physical attributes (open pedestrian passageways and spaces filled with all manner of newsstands, stores, amusement, and places of repose), the LAX terminals closely resemble the city streets and parks long since determined to be impressed with a public trust. Indeed, certain portions of the interior CTA at LAX are even referred to as "streets" and "sidewalks." (J.A. 24a-25a.) A person who uses the terminal, just as one who uses a street, as a forum for the dissemination of religious or political views, is not "making an anomalous use of it," and is neither "out of place" nor "out of order."[8] This does not suggest that all parts of all airports are traditional public forums. Some parts of airport facilities are not forums for security reasons, and so are

8. Kalven, *supra* note 4.

not open to the non-traveling or even traveling public by reason of the same compelling interests.

This case is remarkably similar to another Los Angeles ordinance involving another public forum almost fifty years ago. That ordinance provided that "[n]o person shall distribute any hand-bill to or among pedestrians along or upon any street, sidewalk or park . . .." *Schneider v. State*, 308 U.S. 147, 154 (1939). Los Angeles argued that the ordinance "leaves persons free to distribute printed matter in other public places," *id.* at 163, just as it now contends that Jews for Jesus is free to distribute tracts on the sidewalk outside the LAX terminals. This Court in *Schneider* invalidated the ordinance. "[O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Id.* at 163.

c. *Contrast to Limited Forums and Non-Forums.* Non-forums to which access for expressive purposes may generally be denied are, for the most part, places that are constructed and used for particular narrow purposes and are not open to the public. Markedly different from open-to-the-public airport terminals are government workplaces and fund drives, *Cornelius v. NAACP Legal Defense & Education Fund*, 105 S.Ct. 3439, 3450 (1985); utility poles, *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 814 (1984); meetings between public employers and their employees' exclusive collective bargaining representatives, *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271, 280-82 (1984); interschool mail systems, *Perry Educational Association v. Perry Local Educators' Association*, 460 U.S. 37, 47 (1983); letterboxes where mail must be secure, *United States Postal Service v. Council of Greenburgh Civic Association*, 453 U.S. 114, 129-30 (1981); paid advertising cards on buses, *Lehman v. City of Shaker Heights*, 418 U.S. 298, 303-04 (1974); and the curtilage of jail houses, *Adderley v. Florida*, 385 U.S. 39, 41 (1966).

Contrasting the nature of the place in *Adderley* with that in *Edwards v. South Carolina*, 372 U.S. 229 (1963), Justice

Black emphasized that "[t]raditionally, state capital grounds are open to the public. Jails, built for security purposes, are not." *Id.* at 41. The state was thus entitled to ban expressive activity "on that part of the jail grounds reserved for jail uses." *Id.* at 47. Because in this closed, secured physical context the state could take this action, it followed that "people who want to propagandize protests or views [do not] have a constitutional right to do so whenever and however and wherever they please." *Id.* at 48.

On the other hand, "one who is rightfully on a street which the state has left open to the public carries with him there as elsewhere the constitutional right to express his views in an orderly fashion." *Jamison v. Texas*, 318 U.S. 413, 416 (1943). Although "whether the property has been generally opened to the public . . . is not determinative of whether the property should be at all available for "the use of the people for communicative purposes," it is at the very least "a factor to consider," *United States v. Grace*, 461 U.S. 171, 177 (1983), and, as a practical matter, has proved to be of considerable weight.[9]

The Board mistakenly relies on *Greer v. Spock*, 424 U.S. 828 (1976). In *Greer*, Army authorities had a "special interest" in regulating all activities "within the confines of the military reservation." *Id.* at 837.[10] The peculiar exigencies of the military constitute an overriding governmental interest re-

---

9. This Court in *Perry* recognized in determining that the interschool mail system was not a public forum, that "as the case comes before us, there is no indication in the record that school mailboxes and interschool delivery systems are open for use by the general public." 460 U.S. at 47. In *Cornelius*, this Court recognized that a policy of "general access" was an important factor in determining whether a public forum has been created. The Board of Airport Commissioners has acknowledged that the CTA at LAX is open to members of the general public without restriction, regardless of their intent or desire to utilize the transportation related facilities (J.A. 13a, para. 31.)

10. This Court in *Greer* emphasized the "special constitutional function of the military in our national life, a function both explicit and indispensable." In the case now before the Court, a wide range of activity flourishes within the confines of the CTA at LAX. Clearly there does not exist a "special constitutional function" as was found in *Greer*.

quiring judicial deference to the commander's decision to restrict speech within the base. *See also, e.g., Goldman v. Weinberger*, 106 S.Ct. 1310, 1313 (1986) (free exercise of religion); *Rostker v. Goldberg*, 453 U.S. 57, 70 (1981) (equal protection).

3. *A Major Airport Is One of the Primary City Gates, Which by Tradition and by Function Are Traditional Public Forums.*

a. *Classical City Gates.* City gates as places where ideas were examined are concepts as ancient as scripture. In the scriptures, a refugee at a city of refuge "shall stand at the entrance of the gate of the city and explain his case to the elders.[11] The locus of the city gates as places of judgment and ideas is also reflected in the proverb that proclaims, "Wisdom cries aloud in the street; in the markets she raises her voice; on the top of the walls she cries out; at the entrance of the city gates she speaks . . .."[12] The role of the city gate as a place for teaching of the law and faith is also found in Nehemiah where "both men and women and all who could hear with understanding" gathered "into the square before the Water Gate to hear the law."[13] It was a beggar seeking alms at the Beautiful Gate of the Temple in Jerusalem, a man lame from birth, who saw Peter and John and solicited money.[14] The city gates, streets, and squares were places at which scriptures teach wisdom, truth, and healing were spread.

b. *National Transportation Gateways.* In modern times, as new transportation routes were created and new means for transporting goods and people were discovered, public spaces were increasingly located at transportation "crossroads." Town squares, waterfronts,[15] and later railroad terminals became three of the important forums.

---

11. *Joshua* 20:14.
12. *Proverbs* 1:20-21.
13. *Nehemiah* 8:1-2.
14. *Acts* 3:2.
15. Waterfronts of the nineteenth century were accompanied by agoric activities that are widely illustrated. *See generally* I J. FORLONG, ENCYCLOPEDIA OF REGIONS 49 (1964); *e.g.*, H. MELVILLE, MOBY DICK, OR THE WHALE 795-77 (Library of America ed. [1st ed. 1851]) "[T]he waterfront was the

Railroad stations, like waterfronts, were often the central public spaces around which entire towns were built.[16] The great metropolitan railroad stations, built at the turn of the century, clearly manifest the tradition of agora type activity. Grand Central Station in New York is such a forum: it is a gateway, a transportation hub, a center of commerce, and a meeting place. Grand Central has such "First Amendment activities" as newsstands, a stock exchange information booth, and political activists and religious evangelists.

c. *Major Airports.* Today, major airports are the primary gateways to the cities, if not cities in themselves, and they have supplanted waterfronts and railroad terminals as primary public forums. In fact, at LAX a picture of the mayor of the City of Los Angeles is displayed in each of the terminal buildings on a sign that states, "Mayor Tom Bradley Salutes the New LAX—Gateway to the Olympics."

Built with and maintained by public funds, large municipal airports are regional, national, and international urban transportation centers. K. LYNCH, THE IMAGE OF THE CITY 74-75 (1960). They draw more people than the population of any American city, and attract nearby development,[17] reflecting their function as agora. In fact, having most of the characteristics of "cities,"[18] such major airports are effectively "cities in themselves" with "a daily population greater than most of

---

scene of all sorts of public events . . . . Market Street Wharf and other wharves to the north of it were not only landing places, but also served as business streets." J. KEMBLE, SAN FRANCISCO BAY: A PICTORIAL MARITIME HISTORY 16 (1957).

16. Atlanta, Dallas and Denver are examples of cities that were formed around new railheads and also at the intersections of major rail lines. H. CONWAY, THE AIRPORT CITY (1977).

17. "There is an abundance of experience now available which demonstrates that development clusters quickly around big, busy airports even if they are built at some distance from the central business district in relatively undeveloped areas. In short, it is impossible for the big airport to escape the city." H. CONWAY, *supra* note 16, at 239.

18. It is apparent that the airport is a complex place, where multifaceted activities include boutiques, *Airport Shopping Spree*, FLYING TIMES, Nov.-Dec. 1986, at 3-6; health spas, sleeping quarters, S.F. Sunday Examiner & Chronicle, July 13, 1986 at T10; N.Y. Times, March 13, 1986, at F6; and meeting spaces, Project for Public Spaces, Inc., An Analysis of User Needs

the cities of the nation."[19] In 1985, the Port Authority of New York and New Jersey sparked a controversy when it called for the demolition of Kennedy Airport's Protestant, Roman Catholic, and Jewish chapels. *See* New York Times, August 25, 1985, at 47. The very presence of the chapels in the airport, *see Brashick v. Port Authority*, 484 F.Supp. 697 (S.D. N.Y. 1979), *aff'd mem.*, 628 F.2d 1344 (2d Cir. 1980), is proof of an airport's essentially agora-like nature.

The critic Paul Goldberger has written that "[a]n airport is an entrance to a city, so it should reflect the city's best aspects."[20] Access is one of those aspects which should be safeguarded. As noted planner Kevin Lynch has observed, "[U]ser control must not deny others the basic opportunities [for access] that the owners themselves enjoy. Regulations by present users often entail the exclusion of others who may have a legitimate interest in the use of the place or of some similar place."[21]

4. *Major Airports Have Been Treated by Lower Court Decisions as Public Forums.*

a. *Four Circuits' Unanimous Decisions on Major Airports.* Every federal court of appeals and district court that has confronted the question has held that an airport terminal is a public forum. The first appellate decision concerning the availability of public airport terminals for expressive activity

---

and Patterns . . . International Arrival Terminals [of] John F. Kennedy International Airport 15-16, 20-24 (Sept. 1985).

19. Major airports, such as those in Chicago, New York and *Los Angeles*, possess many unmistakably urban characteristics. These airports employ thousands of people who engage directly and indirectly in the commerce of goods, services, ideas and information. Today's airport manager has been likened to a metropolitan "mayor" who is the chief administrator of a "large and diverse constituency" who must now "operate such lawful city services as fire protection, emergency medical police and security services, and in many cases, a water system, sewage treatment system and communication system. At the same time, the administration must deal with concessions, ground transport and maintenance of building and grounds—all for a 'city' having a daily population greater than most of the cities of the nation." H. CONWAY, *supra* note 16, at 242 (emphasis added).

20. P. Goldberger, *Design Notebook*, New York Times, March 23, 1978, at C10.

21. K. LYNCH, GOOD CITY FORM 208 (1981).

came in 1973, *Kuszynski v. City of Oakland*, 479 F.2d 1130 (9th Cir. 1973), and was followed by decisions from opposite ends of the country holding that speech could not be barred from other similar transportation facilities. *Wolin v. Port of New York Authority*, 392 F.2d 83 (2d Cir.), *cert. denied*, 393 U.S. 940 (1968) (bus terminals); *In re Hoffman*, 67 Cal. 2d 845, 434 P. 2d 353, 64 Cal. Rptr. 97 (1967) (railroad station).[22] From then until now, as evidenced by the decisions below in this case (*see* Appendices C and D for full text), lower courts have uniformly recognized that the exclusion of speech from airport terminals could not be reconciled with the First Amendment. *See, e.g., Fernandes v. Limmer*, 663 F.2d 619, 626 (5th Cir. 1981) (noting that the result "is now generally well established"), *cert. dismissed*, 458 U.S. 1124 (1982). The District of Columbia Circuit noted the "unusual consensus of judicial, legislative, and administrative opinion [that] would classify the public areas of [airports] squarely within the public forum family." *United States Southwest Africa/Namibia Trade & Cultural Council v. United States*, 708 F.2d 760 (D.C. Cir. 1983).[23] This recognition has proceeded from judicial acknowledgment of the essential similarity, for forum analysis purposes, of metropolitan airport terminals and "traditional public forums such as streets." Thus the Seventh Circuit observed that O'Hare Airport's "spacious, city owned common areas . . . resemble those public thoroughfares which have long been recognized to be particularly appropriate

---

22. *See Lehman v. City of Shaker Heights*, 418 U.S. 298, 313 n.4 (1974) (Brennan, J., joined by Stewart, Marshall and Powell, JJ., dissenting) (noting that *Wolin* and *Hoffman* extended "[p]ublic forum status . . . to municipal bus terminals and railroad stations").

23. This consensus has, indeed, recently spread across international borders. In Committee for Canada v. Canada, 1 F.T.R. 71 (Fed. Ct. 1986), a ban on expression at the Montreal International Airport was held to violate § 2 of the Canadian Charter of Rights and Freedoms. To the court, which found it "preposterous . . . to disregard the thoughtful considerations of American jurists," it "seem[ed] plain and obvious . . . that the public terminal concourses in our Canadian airports, as well as in American airports, have become contemporary extensions of the streets and public places of yesterday. They are indeed 'modern crossroads' for the intercourse of the travelling public." *Id.* at 75-76.

places for the exercise of constitutionally protected rights to communicate ideas and information." *Chicago Area Military Project v. City of Chicago*, 508 F.2d 921, 925 (7th Cir.), *cert. denied*, 421 U.S. 992 (1975). The Fifth Circuit, writing of the Dallas-Fort Worth Regional Airport, found "clear and powerful" the parallel between public streets and the crescent-shaped central concourses of the airports' terminal buildings where air travelers as well as the general public may shop, dine, and sightsee. *Fernandes v. Limmer*, 663 F.2d at 627.

An intense flurry of litigation involving the appropriateness of airport terminals for expression occurred during the period from 1974 to 1978, with a few cases thereafter.[24] These cases confirmed the appropriateness of airport terminals as places for expressive conduct by way of either final judgments,[25] temporary injunctions,[26] agreed judgments,[27] stipulated dismissal upon enactment of regulations by the local au-

---

24. Litigation involving the Los Angeles airport is described separately. *See infra* Part II(B)(2).

25. ISKCON v. City of St. Louis, No. 70509-F (St. Louis, Mo. Cir. Ct. Apr. 2, 1979) (Lambert International Airport, St. Louis); ISKCON v. Lentini, 461 F. Supp. 49 (E.D. La. 1978) (New Orleans International Airport); ISKCON v. Wolke, 453 F. Supp. 869 (E.D. Wis. 1978) (General Mitchell Field, Milwaukee); ISKCON v. Adlum, No. C-75-4015 (W.D. Wash. Feb. 7, 1978) (Seattle-Tacoma International Airport); ISKCON v. Collins, 452 F. Supp. 1007 (S.D. Tex. 1977) (Houston Intercontinental Airport); ISKCON v. Engelhardt, 425 F. Supp. 176 (W.D. Mo. 1977) (Kansas City International Airport); Mahoney v. Cook, Civ. No. C-4778 (D. Colo. Aug. 25, 1975) (Stapleton International Airport).

26. ACLU v. Ginty, No. C-2-77-251 (S.D. Ohio Apr. 19, 1977) (Port Columbus International Airport); ISKCON v. Cunningham, Civ. No. 76-563 (D. Or. July 9, 1976) (Portland International Airport); ISKCON v. Lamb, No. CIV-LV-75-88-RDF (D. Nev. Oct. 17, 1975) (McCarran International Airport, Las Vegas); ISKCON v. Wetzel, No. Civ. 75-450 PHX WAC (D. Ariz. Sept. 2, 1975) (Skyharbor Municipal Airport, Phoenix); ISKCON v. Garey, No. C-75-705 (N.D. Ohio Aug. 29, 1975) (Cleveland Hopkins International Airport); ISKCON v. Sorenson, No. 190090 (San Mateo County, Cal. Super. Ct. Mar. 13, 1975) (San Francisco International Airport).

27. ISKCON v. Stover, CIV-76-486M (D.N.M. Oct. 3, 1976) (Albuquerque International Airport); ISKCON v. Fillis, No. C-75-443 (D. Utah Mar. 22, 1976) (Salt Lake City Municipal Airport); ISKCON v. Hynes, No. 75-9421 (Alaska Super. Ct. 3d Dist. Mar. 11, 1976) (Anchorage International Airport).

thorities,[28] or reversal of criminal convictions.[29] Other "second generation" cases involved challenges to particular rules short of exclusions.[30]

b. *California Court Decisions on LAX*. The Los Angeles airport terminals have long been places available to members of the public in which to engage in expressive activity. During at least the past ten years, a variety of religious and political groups, including Jews for Jesus and Snyder, have utilized the CTA at LAX to distribute literature and communicate ideas. (J.A. 11a, para. 22.)

In 1974, an injunction securing the right to distribute literature in the LAX terminals was issued by Judge (now Justice) Campbell Lucas. *International Society for Krishna Consciousness v. Davis*, No. C 104943 (Los Angeles Super. Ct. Nov. 27, 1974). That is precisely what Jews for Jesus seeks to do in this case. That relief was broadened by a unanimous decision of the California Supreme Court forbidding arrest for the "sale of religious literature or solicitation of donations in any portion inside or outside at the Los Angeles International Airport generally open to the public." *Id.*, Civ. No. 45347 (Cal. Jan. 8, 1975). While in form temporary, the order in fact endured for a considerable period.[31]

---

28. ISKCON v. Waser, No. C-77-107 (E.D. Wash. Sept. 7, 1979) (Spokane International Airport); ISKCON v. Flesch, No. 76-69 (E.D. Ky. July 12, 1978) (Greater Cincinnati Airport); ISKCON v. Andersen, No. Civ. 76-0-388 (D. Neb. Apr. 19, 1977) (Eppley Airfield, Omaha), attorney's fees awarded, 569 F.2d 1027 (8th Cir. 1978); ISKCON v. Mercado, No. 76-8 (D.P.R. Sept. 23, 1976) (San Juan International Airport); ISKCON v. Bosquez, Civ. No. SA-76-CA-189 (W.D. Tex. Aug. 20, 1976) (San Antonio International Airport); ISKCON v. Pixley, No. CIV 4-75-631 (D. Minn. July 2, 1976) (Wold-Chamberlain Field, Minneapolis-St. Paul); ISKCON v. Massachusetts Port Auth., No. 75-3468-T (D. Mass. Nov. 10, 1975) (Logan International Airport).

29. Arsenalt v. State, No. 75-18473 (Fla. Cir. Ct. Oct. 24, 1975) (Miami International Airport).

30. *See, e.g.*, U.S. S.W. Africa/Namibia Trade & Cultural Council v. United States, 708 F.2d 760, 764 (D.C. Cir. 1983); Rosen v. Port of Portland, 641 F.2d 1243 (9th Cir. 1981); ISKCON v. Eaves, 601 F.2d 809 (5th Cir. 1979); ISKCON v. Rochford, 585 F.2d 263 (7th Cir. 1978).

31. Later attempts by city officials to deter solicitation and distribution at the airport by the attempted enforcement of a parcel of miscellaneous

The overall guidelines were, or should have been, finally established by a 1978 plenary opinion of the California Supreme Court. *People v. Fogelson*, 21 Cal. 3d 158, 577 P.2d 677, 145 Cal. Rptr. 542 (1978). In *Fogelson*, an adherent of the Hare Krishna faith was convicted of violating a local ordinance by soliciting contributions on public property, specifically the main lobby of the Trans World Airlines terminal at the Los Angeles airport, without a permit. *Id.* at 161-62, 577 P.2d at 678-79, 145 Cal. Rptr. at 543-44. The conviction, challenged on both federal and state constitutional grounds, *id.* at 161, 577 P.2d at 678, 145 Cal. Rptr. at 543, was unanimously reversed on the basis that the ordinance vested overly broad discretion in licensing officials to grant or deny permission to solicit, *id.* at 167, 577 P.2d at 682, 145 Cal. Rptr. at 547. In the course of its decision, however, the court pointed out that the ordinance covered not only "city streets and parks, clearly First Amendment forums," but also—plainly referring to the airport terminal in which the arrest occurred—"to 'public' areas in municipal buildings, which are also appropriate areas for exercise of protected activity." 21 Cal. 3d at 167 n.9, 577 P.2d at 682 n.9, 145 P.2d at 547 n.9.[32] The state supreme court

---

criminal ordinances failed when charges were dismissed on the ground that the activities of the defendants, members of the Krishna Consciousness Society, were constitutionally protected. *People v. Hawk*, No. 823596 (Los Angeles, Cal. Mun. Ct. Dec. 27, 1976); *People v. Mendoza*, No. 752864 (Los Angeles, Cal. Mun. Ct. Dec. 7, 1976), *appeal dismissed by abandonment*, No. CR A 15373 (Cal. Super. Ct. App. Dep't May 25, 1978).

32. As authority for the latter proposition, the court cited In re Hoffman, 67 Cal. 2d 845, 850-51, 434 P.2d 353, 356-57, 64 Cal. Rptr. 97, 100-01 (1967). *Hoffman*, the seminal California public-forum decision, has been authoritatively read as an interpretation of the California Constitution's free speech provision, Cal. Const. art. I, § 2. *See* Robins v. Pruneyard Shopping Center, 23 Cal. 3d 854, 909, 592 P.2d 341, 346-47, 153 Cal. Rptr. 854, 859-60 (1979), *aff'd sub nom.* Pruneyard Shopping Center v. Robins, 447 U.S. 74 (1980). It is "a protective provision more definitive and inclusive than the First Amendment." [redacted] v. Superior Court (Watson), 13 Cal. 3d 552, 658, 532 P.2d 116, 120, 119 [redacted] Rptr. 468, 472 (1975).

The *Hoffman* line of cases, and *Fogelson* in particular, would have provided a substantial basis in state law for the decision of the court below in this case. A state constitutional violation was alleged in the complaint, Complaint for Declaratory, Preliminary and Permanent Injunctive Relief at 9-11, paras. 22-24, 26, and was extensively argued in the courts below, *see*

thus effectively recognized that the terminals of the Los Angeles airport constitute a public forum.[33]

The most recent litigation prior to the present case began with a state court action filed by the Krishna Consciousness Society after adoption of the same resolution at issue here. The city removed the action to federal court and later filed its own federal lawsuit against the Krishna Society and four other organizations, seeking a declaration that the resolution was valid and an injunction against its violation. The cases were consolidated. *International Soc'y for Krishna Consciousness v. City of Los Angeles*, No. CV-83-5229-ER (June 29, 1984) [hereinafter *ISKCON v. Los Angeles*].

The city's suit was dismissed for want of subject matter jurisdiction because the claim for a declaration that the resolution was constitutional did not constitute a federal question. *ISKCON v. Los Angeles*, slip op. at 3-6. In the Krishna Society's action, the court held that "whether the resolution violates the First Amendment is not an actual case or contro-

Trial Br. of Plaintiffs and Counterdefendants at 39-45; Appellees' Br. at 6-18. It is, of course, settled practice that when a case in the federal courts may be resolved upon a pendent state claim rather than a federal constitutional claim "that course is usually pursued and is not departed from without important reasons." Siler v. Louisville & N.R.R., 213 U.S. 175, 193 (1909). The corollary to the general principle that decision of federal constitutional questions should be avoided when possible, Ashwander v. TVA, 297 U.S. 288, 346-47 (1936) (Brandeis, J., concurring), applies equally when the pendent ground is the state constitution rather than a statute. City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283, 294-95 (1982). Indeed the Ninth Circuit itself, shortly before its opinion in this case, had pretermitted a federal constitutional ground for deciding a challenge to a California city's ban on expressive activity at a stadium and convention center in favor of basing its decision on the state constitution's free-speech clause. Carreras v. City of Anaheim, 768 F.2d 1039, 1042-43 (9th Cir. 1985). The courts below in this case, however, inexplicably ignored the state constitution.

33. After *Engelson*, the state superior court issued, at the city's request, certain time, place, and manner rules. City of Los Angeles v. ISKCON , No. C 270320 (Los Angeles, Cal. Super. Ct. Sept. 4, 1979). This action was resolved by settlement along with four affirmative state-court cases that have been brought by the Krishna Consciousness Society or its members. ISKCON v. Davis (above); Baktapriva v. Trusel, No. C177985 (Los Angeles, Cal. Super. Ct. filed Oct. 22, 1976); Bonaccurso v. City of Los Angeles, No. C274022 (Los Angeles, Cal. Super. Ct. filed Mar. 25, 1979); Holtzman v. Davis, No. C187786 (Los Angeles, Cal. Super. Ct. filed Jan. 25, 1977).

versy," and that "[t]here is not sufficient adversity between the parties to make determination of the federal constitutional question appropriate." *Id.* at 9.

c. *FAA Regulations.* The Federal Aviation Administration recognized the traditional public forum nature of National and Dulles International Airports. Pursuant to legislative mandate,[34] it promulgated regulations regarding "certain non-commercial activities" at those airports—the distribution of literature and the solicitation of contributions. 14 C.F.R. §§ 159.91, 159.93-94 (1986). The FAA noted that "large portions of the airport buildings were designed for and are open to the general public," and that "[t]here is a considerable amount of social and commercial interchange in the terminals."[35] The agency concluded that, "in many respects, the terminals are like any other public thoroughfare where there is no question" that expressive activity is appropriate.[36]

5. *No Justification Has Been Shown by LAX, Either by Compelling Interest or Least Restrictive Means, for the Airport Ban on "First Amendment Activities."*

a. *No Compelling Interest.* Essentially conceding that it has no justification for its policy (Br. of Petitioners 26), the Board engages in the ritual incantation of its desire to "limit the uses of the facilities to their intended and dedicated airport-related facilities," *id.* at 7; *see id.* at 8, 10, 11, 12, 13, 15, 16, 18, 19, 23, 24, 27; and the bare assertion of a "right" to do so, *e.g.*, *id.* at 19. Almost as an afterthought, the Board finally seeks, with no record support, "the recognition that the Airport's functions would be seriously disrupted by the activities of all the groups who wish to use the terminal buildings to expound their views on a myriad of subjects." *Id.* at 26-27. There is not even a scintilla of evidence of "disruption" put forth by the Board in support of its position.

The record shows, however, that over a period of at least ten years, "a variety of religious and/or political groups have

34. 49 U.S.C. app. 1359 (1982).
35. 45 Fed. Reg. 35,314 (1980).
36. *Id.*

utilized the interior area of the terminal at LAX, including the pedestrian walkways located therein, to distribute literature, solicit funds, and communicate ideas." (J.A. 11a, para. 22.) Despite this long history, there is nothing in the record to show the existence of any problem whatsoever, much less any "serious[] disrupt[ion]," in connection with the functioning of the airport that arose as a result of these communicative activities, and the Board does not assert any. The only references in the record in any way related to pedestrian congestion or the like are (1) that the airport's recent "expansion and construction project" resulted in "reducing the levels of pedestrian and vehicular congestion both inside and outside of the terminal complexes" (J.A. 8a, para. 8), (2) that the airport is "not aware of any occasion" on which respondents intentionally engaged in any untoward behavior (J.A. 18a, para. 63), and (3) that, at the time an officer warned Mr. Snyder to cease his "First Amendment activities," those activities in fact were having not the slightest detrimental or even any noticeable effect on the normal functioning of the airport (J.A. 19a, para. 67-68).

Not only is the record devoid of any evidence that the LAX terminals are so congested as to be inconsistent with "First Amendment activities," but such a conclusion is belied by experience. As has been noted, the terminals have in fact been "open" for expression on a virtually unregulated basis for at least ten years, yet the Board has made not the slightest effort to demonstrate any resulting deleterious effects. Moreover, many of the "First Amendment activities" to which the airport is purportedly closed are functionally indistinguishable from the uses already explicitly allowed to the public as a matter of course. (J.A. 13a, para. 31.) The issue is not whether LAX is congested—airports have crowds with or without "First Amendment activities"—but whether LAX's congestion is so increased by such activities that the Board has a compelling interest in quashing First Amendment rights. The Board has failed to establish any "compelling state interest"

that could in any way justify the resolution. *Carey v. Brown*, 447 U.S. 455 (1980).[37]

The fact that many varieties of expression are presently engaged in without a detrimental impact upon any legitimate governmental interest further indicates that free speech is fully compatible with the business of the airport. While the leaflets distributed by Jews for Jesus can be read at one's leisure or simply discarded, many expressive activities already permitted by the city government cannot be so easily avoided. For example, the endangered species display, "Think Before You Buy" (J.A. 12a-13a, para. 24), as a large stationary object, poses much greater potential for congestion since observers may be attracted to congregate around it. By contrast, the distribution of pamphlets by an individual does not require a pedestrian so much as to break stride in order to receive or refuse the message offered.

Over the last decade it has been repeatedly shown that expressive activities can and do easily coexist with the "transportation functions" of airports. Regulations have been enacted establishing simple ground rules successfully dealing with any actual or potential difficulties. Among these are the regulations promulgated by the FAA in 1980 to allow First Amendment activities in National and Dulles Airports, as described at *supra* p. 23.

The successful coexistence of First Amendment activities and most major airports, and the lack of any demonstration

---

37. *See, e.g.*, Madison Joint School Dist. v. Wisconsin Employment Relations Comm'n, 429 U.S. 167 (1976). Although a state may conduct business in private session, "[w]here the state has opened a forum for direct citizen involvement," exclusions bear a heavy burden of justification. In Carey v. Brown, 447 U.S. 455 (1980), not only did this Court require the state to carry the burden of showing that the regulation at issue was necessary to serve a compelling state interest, but also required that the regulation be drawn narrowly to achieve the compelling state interest *id.* at 461-65. LAX has failed to establish any compelling state interest in passing the resolution. Even assuming *arguendo* that the resolution served some compelling state interest, LAX certainly cannot carry its burden that the resolution was narrowly drawn to achieve a compelling state interest, when the resolution on its face purports to ban all "First Amendment activity" from the CTA at LAX. (J.A. 18a, para. 64.)

or even serious assertion of untoward consequences from Jews for Jesus' literature distribution, make plain that the drastic ban which the Board proposes here does not further and is not necessary to protect any compelling interest.

b. *No Least Restrictive Means.* The LAX resolution boldly states that the "[a]irport is not open for First Amendment activities by any individual and/or entity . . .." Los Angeles Bd. of Airport Comm'rs Resolution 13787 (July 13, 1983). (J.A. 5a.) (*See* Appendix B for relevant portions of the resolution.) This language is hardly precise (*see infra* Part II), but it cannot be intelligibly interpreted except to ban any airport communication to members of the public of religious or political views. Even in the closed forum in *Perry*, the public schools did not seek to ban all expression, but instead left bulletin boards for non-official messages such as union information. 460 U.S. at 53. The Board's resolution is the *most* restrictive means imaginable to accomplish any conceivable state interests. It achieves the Board's goals only by reducing the overall quantity of expression and by eliminating pure speech to preserve commercial speech and non-expressive activities.

In *Heffron v. International Society for Krishna Consciousness*, 452 U.S. 640 (1981), the "booth rule" of the Minnesota State Fair, a place which the Court described as but a "limited public forum," *id.* at 655, was upheld only because it allowed oral propagation of views anywhere on the fairgrounds, *id.* at n. 16. The instant resolution, however, prohibits all access to the interior of the CTA for communicative purposes even though, as the Fifth Circuit has noted, a municipal airport "is not 'limited' in the same ways" as a state fair. *Fernandes v. Limmer*, 663 F.2d 619, 634 (5th Cir. 1981), *cert. dismissed*, 458 U.S. 1124 (1982). Because an airport "is a permanent, on-going concern," its managers "are not subject to the same pressures" as are those of a state fair "in formulating short-lived, expedient regulations to ensure order." *Id.* While in Los Angeles, as in Dallas, "[c]ertain areas of the terminals may be as crowded as the fairground in *Heffron*," the

Board here, like the officials in *Fernandes*, "have not shown which, if any, areas are so congested." *Id.*

Many less restrictive alternatives exist in order to accomplish the Board's goals. These include limiting the current unrestricted public access to the terminals by excluding non-travel-related visitors, limiting reasonably the number of First Amendment expressants (as the FAA regulations do), restricting the place of expression away from peak congested areas and high security areas, or regulating the manner of expression as necessary to prevent torts or public disturbances.

The FAA regulations provide an example of less restrictive means, as promulgated in 1980 for National and Dulles Airports. The agency concluded, after a careful study, that a ban on expression was by no means necessary to preserve fully the smooth functioning of the airports under its charge, and that appropriate regulations could do the job. 45 Fed. Reg. 34,314, 35,315-17 (1980). The rules allow people *within the terminals* to distribute written matter or solicit contributions, and require anyone wishing to do so to apply for and obtain one of a fixed but reasonable number of permits, 14 C.F.R. § 159.93(b)-(d). The permits are granted "on a 'first come, first serve' basis," *id.* § 159.93(e). The FAA thus assures that the "solicitors or distributors of literature not exceed a number which would aggravate existing congestion." 45 Fed. Reg. at 35,315. In addition, solicitation or distribution may not be conducted within ten feet of any one of a number of specified places that are sensitive for any reason, such as serious congestion or security risk. 14 C.F.R. § 159.94(d). In this way the agency believes it "provides the maximum freedom of movement to leafleteers and solicitors" while at the same time preserving "the rights of others using the airports." 45 Fed. Reg. at 35,315. There is no reason to think this less restrictive alternative would not work at LAX, particularly in view of the higher need for security precautions at the Washington airports.

B. If Not a Traditional Public Forum, LAX Is Still an Open Forum, Where a Ban on "First Amendment Activities" Is Unconstitutional.

1. *The* Perry *Test Is Neither an Exclusive Test Nor Applicable to LAX.*

The Board has premised much of its argument on the supposition that all public places fit into one of three categories for the purpose of public forum analysis. The Board relies on this Court's decision in *Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37 (1983). In *Perry*, three categories of forums were addressed by the Court. The first category, the so-called *traditional public forums*, are those places "which by long tradition or government fiat have been devoted to assembly and debate," and where "the rights of the State to limit expressive activity are sharply circumscribed." *Id.* at 45.

The second category, the *opened public forum*, "consists of public property which the State has opened for use by the public, even if it were not required to create the forum in the first place. *Id.* at 46. As is the case with traditional public forums, the state's right to limit expressive activity is sharply circumscribed. In order to pass constitutional scrutiny, the state, in order to enforce a regulation in a traditional or open public forum, must establish both a compelling state interest and a narrowly drawn means to achieve that end. *Id.* at 45; *Carey v. Brown*, 447 U.S. 455, 461 (1980)

The final category discussed in *Perry* involves those public properties which are not by tradition or by designation a forum for public communication. In these *non-public forums*, "the State may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." *Perry*, 460 U.S. at 46.

a. *Nonexclusive Test.* While it is the position of Jews for Jesus that the CTA at LAX is both a traditional public forum and an opened public forum, Jews for Jesus submits that the

Perry test is not an exclusive one. The *Perry* opinion does not set forth an immutable set of universally applicable "tests," and instead recognizes that public forum questions lie along a "spectrum." *Id.* at 45. Indeed no other view comports with the infinitely variable span of places and facilities that are controlled by government. The factors that may come into play when a citizen seeks access to one of these places or facilities are too complex, too interdependent, and too subtle to be catalogued in advance for all purposes.

The *Perry* test does not cover the "limited public forum" recognized in *Heffron v. International Society for Krishna Consciousness*, 452 U.S. 640 (1981) (state fair). Indeed, this Court, in *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789 (1984), a case decided after *Perry*, recognized that the determination of whether a particular piece of government owned property is a public forum, may "blur at the edges," quoting from *United States Postal Service v. Greensburgh Civic Association*, 453 U.S. 114 (1981).[38] The *Perry* test is not exclusive.

b. *Inapplicable.* In any event, the *Perry* test is inapplicable to the sorts of pure "First Amendment activities"—religious literature distribution and oral evangelism— present here, particularly where there is not a shred of evidence of disturbance of the peace, physical interference with passengers and the public, or monetary solicitation. Unlike the internal school mail system in *Perry*, the CTA at LAX is open to the general public without restriction (J.A. 8a, para. 5) and permits many "First Amendment activities." Unlike the intragovernmental charitable drive that neutrally excluded all legal defense and advocacy organizations in *Cornelius*, LAX is not a site for only governmental employees, and does not

38. In *Taxpayers for Vincent*, 466 U.S. at 815, Justice Stevens writing for a majority of the Court stated, "... 'the question of whether a particular piece of personal or real property owned or controlled by the government is in fact a 'public forum' may blur at the edges,' and this is particularly true in cases falling between the paradigms of government property interests essentially mirroring analogous private interests and those clearly held in trust, either by tradition or recent convention, for use of citizens at large." (Citations omitted.)

neutrally exclude all expression. Unlike mailboxes with important security considerations in *Greensburgh*, LAX has unquestioned authority to exclude the general public and "First Amendment activities" from properly secured areas. However, LAX has massive pedestrian walkways within the CTA that are accessible to the general public without even having to go through metal detectors, as well as other massive pedestrian walkways that can be reached by any member of the general public after going through metal detector devices.

2. *Even If Applicable, the* Perry *Test Invalidates the Ban on "First Amendment Activities."*

a. *The CTA at LAX Has Been "Opened" for Expressive "First Amendment Activities."* Public property, which the government opens for use by the public for expressive activity, becomes a designated or open public forum, from which the state may not limit expressive activity absent a compelling state interest. *See, e.g., Perry Education Association v. Perry Local Educators' Association*, 460 U.S. at 43, 45; *Widmar v. Vincent*, 454 U.S. 263, 267 (1981). The Board has by practice and policy unequivocally opened the CTA at LAX for indiscriminate use by the general public.[39] As the Board admits, members of the general public are permitted unrestricted access to the CTA at LAX regardless of whether their purpose or activity is airport-related. (J.A. 8a, para. 5.)

In *Widmar v. Vincent*, 454 U.S. 263 (1981), a registered student group sought access to a state university's facilities for religious worship and discussion. This Court held that the state university could not close its facilities to the group because the university had created an open forum. "Through its policy of accommodating their meetings, the University has created a forum generally open for use by student groups." *Id.* at 267. The university's plea that it had created only a "secular" forum failed. Likewise, the Board, through its policy of accommodating other First Amendment activities in the CTA

39. It is the indiscriminate use by the general public, which if present in the *Perry* factual scenario, would have allowed PLEA to "justifiably argue that a public forum has been created." *Id.* at 47.

BEST AVAILABLE COPY

at LAX, has created an open forum for expressive First Amendment activities.

The Board has made a silly effort to justify what in many cases are non-existent relationships between the various "First Amendment activities" conducted at LAX and what it deems "airport-related activities." (Br. of Petitioners 7.) If an endangered species display is "as clear an aid to the traveling public" as emergency exit signs (*id.* at 20), then nearly any message imaginable might be construed to offer some assistance to the traveling public and thereby be airport-related. Although the Board argues that the endangered species display is "nothing more than a warning to the international traveler that the importation of certain goods made from endangered species is illegal" (*id.* at 20), it is nothing of the sort, and simply is an ideological message relating to wildlife conservation. If it were in fact an admonition relating to illegal activity, it would certainly include the warning in its text. However, the text of the message simply states "Think Before You Buy," with no reference to illegal importation or any other illegal activity. (J.A. 12a-13a, para. 29.)

The relationship which the Board seeks to establish between the Christian Science Reading Room and "airport-related activities" is even more tenuous. The Board argues that the operation of a Christian Science Reading Room is airport related as a waiting area, which is adjunct to the terminal facilities. (Br. of Petitioners 20.) Yet there are other more numerous waiting areas in the interior terminals, which do not display religious literature pertaining to the Christian Science faith, and nothing in the record even implies that people may wait in the Reading Room without reading Christian Science literature. The Christian Science Church has promulgated its faith in the CTA at LAX with the Board's express consent since 1966. (J.A. 21a, para. 74.) Therefore, the Board opening the CTA to the Christian Science Reading Room, newsstands, political speeches, ideological displays, etc., constrains LAX to allow the use of its facilities to similar activities and pursuits by organizations such as Jews for Jesus.

Jews for Jesus, in its ministry of the Gospel, is for First Amendment purposes indistinguishable from the pursuits of the Christian Science Church and from newspapers.

The Board's assertion that the city charter mandates that the airport be operated only for airport-related purposes mischaracterizes its authority. That ignores those portions of the charter that not only authorize the Board to enter into leases for *other than airport-related purposes* (J.A. 10a, para. 16), but also authorize the general manager to issue revocable permits to use portions of the airport for *any and all purposes* that would not interfere with air navigation or air commerce. (J.A. 10a, para. 17.) (*See* Appendix A for full text of relevant sections of the Charter.)

In addition to opening the CTA at LAX to expressive "First Amendment activities," the Board has also consented to and in fact entered into leases with newsstands, restaurants, gift facilities, flight insurance counters, and money exchange facilities. (J.A. 11a, para. 18.)

These commercial activities, the activities of Snyder and Jews for Jesus, and those other expressive First Amendment activities which the Board has expressly consented to, have proved to be totally compatible with each other and with the efficient operation of the airport. (J.A. 18a, para. 63.) This Court has in the past "examined the nature of the property and its compatibility with expressive activity to discern the government's intent" in opening or designating a particular place as a public forum. *Cornelius v. NAACP Legal Defense & Education Fund, Inc.*, 105 S. Ct. 3439, 3449 (1985).[40] The Board's intent at LAX cannot be more explicit. It has permitted expressive First Amendment activities and commercial activities in the CTA at LAX without having any detrimental

40. "In cases where the principal function of the property would be disrupted by expressive activity, the Court is particularly reluctant to hold that that Government intended to designate a public forum." Cornelius, 105 S. Ct. 3439, 3450. The record in this case is totally devoid of any evidence that the expressive First Amendment activities have disrupted the operation of the airport. To the contrary, the record clearly shows the compatibility of the expressive First Amendment activities with the operation of the airport at LAX.

effect on the operation of the airport. Clearly, the Board has opened the CTA at LAX as a public forum by its own intent and action. Finally, the Board does not even attempt to put forth a compelling interest, which is required in order to justify the total ban on "First Amendment activities." *Perry*, 460 U.S. at 45.

b. *The Resolution Banning First Amendment Activities Is Impermissible.* Even if LAX is an opened public forum instead of a traditional public forum, the compelling interest test applies. *Perry Education Association v. Perry Local Educators' Association*, 460 U.S. at 43, 45; *Widmar v. Vincent*, 454 U.S. at 267. That test is not met, as discussed in Part I(A)(5) *supra*.

Even if the interior terminal facilities at LAX were nonpublic forums, the resolution banning all First Amendment activity constitutes an unreasonable and therefore unconstitutional suppression of free speech. *Perry*, 460 U.S. at 46. When protected speech takes place in the context of a nonpublic forum, the government's reason for restricting expressive activity must satisfy a reasonableness standard. *Id.*; *Cornelius*, 105 S. Ct. 3349, 3447 (1985). Reasonableness, for purposes of a ban on First Amendment activities in a nonpublic forum, must at least be measured by whether it "furthers some substantial goal of the state." *Cf. Plyler v. Doe*, 457 U.S. 202, 224 (1982) (equal protection rationality standard); *City of Cleburne v. Cleburne Living Center*, 105 S. Ct. 3249, 3258-60 (1985).

In attempting to justify its position that the Resolution is reasonable, the Board again relies on this Court's opinion in *Perry*. (Br. of Petitioners 22-24.) However, one of the bases on which this Court found the regulation in *Perry* reasonable was the existence of "substantial alternative channels that remain open . . . for communication to take place." *Perry*, 460 U.S. at 53. In this case the "alternative channel" for communicating, the sidewalks outside of the terminal area, prohibits Jews for Jesus from reaching over eight million people each year, a number more than the population of the City of New

York. (J.A. 9a, para. 15.) Certainly, this "accommodation" by the Board does not provide Jews for Jesus with *real* or *substantial* alternative channels.

Interestingly, the Board, by authorizing First Amendment activities on the sidewalks in front of the terminal area so long as they do not interfere with other persons (*see* Appendix B), has implicitly recognized that First Amendment activities can be conducted in an unobstructive manner. The Board offers no reason, nor does the record reflect any justification, why expressive activity can be conducted immediately outside the terminal but not inside the terminal facilities. In fact, the sidewalks are much narrower than the pedestrian walkways.

As discussed above, the resolution's ban on "First Amendment activities" is riddled with exceptions. Wide ranges of First Amendment activity are conducted in the CTA at LAX, all of which are compatible with the efficient operation of the LAX airport. The Board has failed to establish any reasonable basis for the resolution. In this context, the Board's claims to the contrary amount to little more than *ipse dixit*.

II. A MAJOR AIRPORT'S BAN ON "FIRST AMENDMENT ACTIVITIES" INVOLVES IMPERMISSIBLE DISCRETION, AMOUNTING TO A PRIOR RESTRAINT, UNDER THE FREE SPEECH AND THE FREE EXERCISE CLAUSES OF THE FIRST AND FOURTEENTH AMENDMENTS.

A. The Airport Ban Involves Impermissible Discretion for LAX Officials, Amounting to a Prior Restraint, in Determining Whether Activities Are "First Amendment Activities" and Whether They Are "Travel Related."

1. *Official Discretion Whether To Permit or Ban First Amendment Activities Is an Impermissible Prior Restraint.*

This Court has many times held arbitrary official discretion to permit or forbid First Amendment activities to constitute an impermissible prior restraint. In *Niemotko v. Maryland*, 340 U.S. 268, 271 (1951), the Court stated the rule as follows:

> This Court has many times examined the licensing systems by which local bodies regulate the use of their parks and public places. See *Kunz v. New York*, decided this day, *post*, p. 290. See also *Saia v. New York*, 334 U.S. 558 (1948); *Hague v. C.I.O.*, 307 U.S. 496 (1939); *Lovell v. Griffin*, 303 U. S. 444 (1938). In those cases this Court condemned statutes and ordinances which required that permits be obtained from local officials as a prerequisite to the use of public places, on the grounds that a license requirement constituted a *prior restraint* on freedom of speech, press and religion, and, in the absence of narrowly drawn, reasonable and definite standards for the officials to follow, must be invalid.

Id. at 271. On the same day as *Niemotko*, in *Kunz v. New York*, 340 U.S. 290 (1951), this Court similarly concluded under "the right . . . to speak on religious matters" that "we have consistently condemned licensing systems which rest in an administrative official discretion to grant or withhold a permit upon broad criteria unrelated to proper regulation of public places." *Id.* at 293, 294. *Accord*, *Secretary of State v. Joseph H. Munson Co.*, 467 U.S. 947 (1984); *Hynes v. Mayor of Oradell*, 425 U.S. 610, 622 (1976).

The Court has applied this principle to invalidate a number of regulations of "First Amendment activities" that, like the LAX ban and airport-related exception, involved impermissible discretion because of unclear standards: the requirement of a license for group use of the streets in *Kunz v. New York*, 340 U.S. 290 (1951);[41] denial of a park permit under a licens-

41. 340 U.S. at 294:

> [We] have consistently condemned licensing systems which vest in an administrative official discretion to grant or withhold a permit upon broad criteria unrelated to proper regulation of public places. In *Cantwell v. Connecticut*, 310 U.S. 296 (1940), this Court held invalid an ordinance which required a license for soliciting money for religious causes. Speaking for a unanimous Court, Mr. Justice Roberts said: "But to condition the solicitation of aid for the perpetuation of

ing practice in *Niemotko v. Maryland*, 340 U.S. 268 (1951);[42] requirement of a permit for use of a loud speaker in *Saia v. New York*, 334 U.S. 558 (1948);[43] restriction of door-to-door witnessing in *Tucker v. Texas*, 326 U.S. 517 (1946);[44] denial of a permit for distributing religious literature in *Marsh v. Alabama*, 326 U.S. 501 (1946);[45] forbidding of door-to-door distribution of handbills or circulars in *Martin v. City of Struthers*, 319 U.S. 141 (1943);[46] forbidding of distribution or

religious views or systems upon a license, the grant of which rests in the exercise of a determination by state authority as to what is a religious cause, is to lay a forbidden burden upon the exercise of liberty protected by the Constitution." 310 U.S. at 307. To the same effect are *Lovell v. Griffin*, 303 U.S. 444 (1938); *Hague v. C.I.O.*, 307 U.S. 496 (1939); *Largent v. Texas*, 318 U.S. 418 (1943). . . .

42. 340 U.S. at 273 (emphasis added):
It thus becomes apparent that the lack of standards in the license-issuing "practice" renders that "practice" a *prior restraint* in contravention of the Fourteenth Amendment, and that the completely arbitrary and discriminatory refusal to grant the permits was a denial of equal protection. . . .

43. 334 U.S. at 559-60 (emphasis added):
We hold that § 3 of this ordinance is unconstitutional on its face, for it establishes a *previous restraint* on the right of free speech in violation of the First Amendment which is protected by the Fourteenth Amendment against State action. To use a loudspeaker or amplifier one has to get a permit from the Chief of Police. There are no standards prescribed for the exercise of his discretion. . . .

44. 326 U.S. at 520:
It follows from what we have said that to the extent that the Texas statute was held to authorize appellant's punishment for refusing to refrain from religious activities in Hondo Village it is an invalid abridgment of the freedom of press and religion.

45. 326 U.S. at 504-05:
Under our decision in *Lovell v. Griffin*, 303 U.S. 444 and others which have followed that case, neither a State nor a municipality can completely bar the distribution of literature containing religious or political ideas on its streets, sidewalks and public places or make the right to distribute dependent on a flat license tax or permit to be issued by an official who could deny it at will. We have also held that an ordinance completely prohibiting the dissemination of ideas on the city streets cannot be justified on the ground that the municipality holds legal title to them. *Jamison v. Texas*, 318 U.S. 413. . . .

46. 319 U.S. at 146-47:
Freedom to distribute information to every citizen wherever he desires to receive it is so clearly vital to the preservation of a free society that, putting aside reasonable police and health regulations of

sale of religious publications without a permit in *Largent v. Texas*, 318 U.S. 418 (1943);[47] a prohibition against solicitation for a religious cause without a certificate from an official who determined whether the cause was actually religious in *Cantwell v. Connecticut*, 310 U.S. 296, 305-06 (1940);[48] a ban on literature distribution and solicitation from house to house without a license in *Schneider v. New Jersey*, 308 U.S. 147 (1939),[49] prohibition against public assembly in streets or

time and manner of distribution, it must be fully preserved. The dangers of distribution can so easily be controlled by traditional legal methods, leaving to each householder the full right to decide whether he will receive strangers as visitors, that stringent prohibition can serve no purpose but that forbidden by the Constitution, the naked restriction of the dissemination of ideas.

47. 318 U.S. at 422 (emphasis added):
Upon the merits, this appeal is governed by recent decisions of this Court involving ordinances which leave the granting or withholding of permits for the distribution of religious publications in the discretion of municipal officers. It is unnecessary to determine whether the distributions of the publications in question are sales or contributions. The mayor issues a permit only if after thorough investigation he "deems it proper or advisable." Dissemination of ideas depends upon the approval of the distributor by the official. This is administrative *censorship* in an extreme form. It abridges the freedom of religion, of the press and of speech guaranteed by the Fourteenth Amendment.

48. 310 U.S. at 305-06 (emphasis added):
[The official] is empowered to determine whether the cause is a religious one, and . . . the issue of a certificate depends upon his affirmative action. If he finds that the cause is not that of religion, to solicit for it becomes a crime. He is not to issue a certificate as a matter of course. His decision to issue or refuse it involves appraisal of facts, the exercise of judgment, and the formation of an opinion. He is authorized to withhold his approval if he determines that the cause is not a religious one. Such a *censorship* of religion as the means of determining its right to survive is a denial of liberty protected by the First Amendment and . . . the Fourteenth. The state asserts that if the licensing officer acts arbitrarily, capriciously, or corruptly, his action is subject to judicial correction . . ..
. . . A statute authorizing *previous restraint* upon the exercise of the guaranteed freedom by judicial decision after trial is as obnoxious to the Constitution as one providing for like restraint by administrative action.

49. 308 U.S. at 164 (emphasis added):
In the end, his liberty to communicate with the residents of the town at their homes depends upon the exercise of the officer's discretion.

parks without a license in *Hague v. C.I.O.*, 307 U.S. 496 (1939);[50] and proscription of literature distribution without a city manager's permission in *Lovell v. City of Griffin*, 303 U.S. 444 (1938).[51] In each case, the official discretion, without precise standards to apply in approving or disapproving First

---

. . . On this method of communication the ordinance imposes *censorship*, abuse of which engendered the struggle in England which eventuated in the establishment of the doctrine of the freedom of the press embodied in our Constitution. To require a censorship through license which makes impossible the free and unhampered distribution of pamphlets strikes at the very heart of the constitutional guarantees.

Conceding that fraudulent appeals may be made in the name of charity and religion, we hold a municipality cannot, for this reason, require all who wish to disseminate ideas to present them first to police authorities for their consideration and approval, with a discretion in the police to say some ideas may, while others may not, be carried to the homes of citizens; some persons may, while others may not, disseminate information from house to house.

50. Saia v. New York, 334 U.S. at 560:

In *Hague v. C.I.O.*, [307 U.S. 496 (1939)], we struck down a city ordinance which required a license from a local official for a public assembly on the streets or highways or in the public parks or public buildings. The official was empowered to refuse the permit if in his opinion the refusal would prevent "riots, disturbances or disorderly assemblage." We held that the ordinance was void on its face because it could be made "the instrument of arbitrary suppression of free expression of views on national affairs." 307 U.S. p. 516.

51. 303 U.S. at 451-52 (emphasis added):

We think that the ordinance is invalid on its face. Whatever the motive which induced its adoption, its character is such that it strikes at the very foundation of the freedom of the press by subjecting it to license and *censorship*. The struggle for the freedom of the press was primarily directed against the power of the licensor. It was against that power that John Milton directed his assault by his "Appeal for the Liberty of Unlicensed Printing." And the liberty of the press became initially a right to publish "*without* a license what formerly could be published only *with* one." While this *freedom from previous restraint* upon publication cannot be regarded as exhausting the guaranty of liberty, the prevention of that restraint was a leading purpose in the adoption of the constitutional provision. See *Patterson v. Colorado*, 205 U.S. 454, 462; *Near v. Minnesota*, 283 U.S. 697, 713-716; *Grosjean v. American Press Co.*, 297 U.S. 233, 245, 246. Legislation of the type of the ordinance in question would restore the system of license and censorship in its baldest form.

Amendment activities,[52] constituted a prior restraint in violation of the First Amendment.[53] Now that this Court has adopted the compelling interest test, the unconstitutional nature of prior restraints, such as LAX's ban on some First Amendment activities, is all the more clear.

2. *LAX Officials Hold and Have Exercised Such Impermissible Discretion.*

The Board holds and has exercised precisely the sort of official discretion that this Court has uniformly struck down as a prior restraint. The resolution does not define or give governing standards for applying the terms "First Amendment activities" or "promotion . . . of . . . air navigation or uses incidental thereto." In fact, the Board has conceded that its "practice has been to permit only those activities *they believe* directly aid the traveling public . . . and to deny all other cases." (Br. of Petitioners at 18, emphasis added.) That standardless discretion falls in three categories: (a) distinguishing non-First Amendment activities from First Amendment activities and banning the latter; (b) distinguishing airport-related First Amendment activities from other First Amendment activities and banning the latter; and (c) distinguishing commercial First Amendment activities from pure First Amendment activities and banning the latter. These are further discussed in Part III(A) *infra*.

There are abundant examples of the Board's unchecked official discretion. (a) It seems rather incredible, in a forum with unrestricted public access, to prefer non-expressive activities over First Amendment activities. No ban exists on various non-expressive activities by the general public in the

---

52. *Accord*, Hynes v. Mayor of Oradell, 425 U.S. 610 (1976); Shuttlesworth v. City of Birmingham, 394 U.S. 147 (1969); Poulos v. New Hampshire, 345 U.S. 395, 407-08 (1953); Jamison v. Texas, 318 U.S. 413, 416 (1943); Cox v. New Hampshire, 312 U.S. 569, 577-78 (1941).

53. Explicit prior restraint language was used in Kunz v. New York, 340 U.S. at 293, 294; Niemotko v. Maryland, 340 U.S. at 271, 273; Saia v. New York, 334 U.S. at 559-60, 561; Largent v. Texas, 318 U.S. at 422 (censorship); Cantwell v. Connecticut, 310 U.S. at 306; Schneider v. New Jersey, 308 U.S. at 164 (censorship); Lovell v. City of Griffin, 303 U.S. at 451-52 (censorship).

terminals, whether or not they are airport-related, but a total ban has been promulgated against "First Amendment activities" unless they are airport-related in an unspecified sense. (b) The airport-related category is a standardless weapon for airport officials to use in excluding disfavored expression, and it has been so used to discriminate against Jews for Jesus. The Christian Science Reading Room is defended as airport-related (Br. of Petitioners 20), although there is no evidence in the record that the general public may use it as a waiting area if they do not read its literature. The endangered species display is also arbitrarily categorized as airport-related (*id.*), although it in fact does not contain any warning about sanctions for violating rights of endangered species in the United States, and instead is simply a permitted political statement. Newsstands are permitted throughout public areas in the terminal, and presumably would be allowed to give Jews for Jesus tracts or sell Jews for Jesus books, although there is nothing more airport-related about newspapers than tracts since airline passengers read both. The ban's exception for airport-related expression is itself the arbitrary creation of unchecked official discretion. (c) It also is incredible, in a forum offering unrestricted public access, to prefer commercial speech over traditional speech, but that too is where unchecked discretion has led. Commercial speech occurs in many stores, while the pure speech of Jews for Jesus is excluded. This all reflects arbitrary discretion vested in the Board.

B. The Airport Ban Involves Vagueness of Its Terms, Chilling Preferred Freedoms, in Referring to "First Amendment Activities" and "Travel Relatedness."

Vague ordinances violate the Due Process Clause, and the Board's resolution embodies both offensive aspects under the vagueness doctrine:

> It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the

> person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibiy delegates basic policy matters to policemen, judges and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application.

Grayned v. City of Rockford, 408 U.S. 104, 108 (1972). Such vagueness produces a chilling effect in violation of the First Amendment.[54] This Court has recognized that "a sweeping statute or one incapable of limitation has the potential to repeatedly chill the exercise of expressive activity by many individuals . . .." *New York v. Ferber*, 458 U.S. 747, 772 (1985).

The Board's ban on "First Amendment activities" contains no definition. This allows and in fact has enabled LAX officials arbitrarily to suffer some First Amendment activities while excluding others. Its exception for "airport-related" expression also contains no definition. This permits and in fact has led to capricious official approval of some First Amendment activities and exclusion of other ones. That indeed "has the potential repeatedly to chill the exercise of expressive activity."

III. A MAJOR AIRPORT'S BAN ON "FIRST AMENDMENT ACTIVITIES" EMBODIES IMPERMISSIBLE CONTENT DISCRIMINATION AND RELIGIOUS DISCRIMINATION, UNDER THE FREE SPEECH, FREE EXERCISE, ESTABLISHMENT, AND EQUAL PROTECTION PROVISIONS OF THE FIRST AND FOURTEENTH AMENDMENTS.

---

54. *E.g.*, Buckley v. Valeo, 424 U.S. 1, 76-82 (1976); Broadrick v. Oklahoma, 413 U.S. 601, 611-12 (1974); Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1972).

A. The LAX Ban Constitutes Content Discrimination against "First Amendment Activities" in Favor of Non-Expressive Activities, and Against Most Traditional First Amendment Expression in Favor of Allegedly Airport-Related Expression and Commercial Speech.

This Court has stressed that government may not grant use of a forum to persons whose views it finds acceptable while denying use to those whose views it opposes:

> But, above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content. [Citations omitted.] . . . The essence of this forbidden censorship is content control. Any restriction on expressive activity because of its content would completely undercut the 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.' *New York Times Co. v. Sullivan*, *supra*, at 270.
>
> Necessarily, then, under the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views. And it may not select which issues are worth discussing or debating in public facilities. There is an "equality of status in the field of ideas," and government must afford all points of view an equal opportunity to be heard. Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say. Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone.

Police Department v. Mosley, 408 U.S. 92, 95-96 (1972).[55]

---

55. *See also* First National Bank of Boston v. Bellotti, 435 U.S. 765, 784-85 (1978); Madison Joint School Dist. No. 8 v. Wisconsin Emp. Rel. Comm'n, 429 U.S. 167, 175-76 (1976); Erznoznik v. City of Jacksonville, 422 U.S. 205, 209, 215 (1975); Note, *Content Regulation and the Dimensions of Free Expression*, 96 HARV. L. REV. 1854 (1983).

Content discrimination exists in its most egregious form in this case, and is entirely unjustified.

1. *The Ban Constitutes Content Discrimination.*

The Board's ban on "First Amendment activities" amounts to content discrimination in three senses: (a) it prefers airport-related First Amendment activities (if an official arbitrarily characterizes them as such) while banning other First Amendment activities; (b) it prefers commercial First Amendment activities while banning many pure First Amendment activities; and (c) it prefers nonexpressive activities, by not subjecting them to an airport-related requirement, while allowing First Amendment activities only subject to such a requirement.

a. *Preferring Airport-Related First Amendment Activities While Banning Other First Amendment Activities.* The very category of airport-related First Amendment activities is itself content discrimination with no governing standards. The arbitrariness and impropriety of the airport-related distinction is evident in its application only to "First Amendment activities" and not to non-expressive activities: non-First Amendment activities come with the general public into LAX without any requirement for airport-relatedness.

That category of airport-related expression appears to have been created with no legal authority, because the city charter authorizes the Board to enter into leases for non-airport-related purposes whenever the Board determines that the use of a portion of the airport property is not necessary for the promotion of air commerce and air navigation. (J.A. 10a, para. 16.) The city charter also empowers the general manager to issue revocable permits to use limited portions of the airport facility "for any and all purposes which shall not interfere with air commerce or air navigation and not be inconsistent with any trust on which such land may be held . . .." (J.A. 10a, para. 16.) Thus, except for arbitrary official action, the exclusion should only be of activities *inconsistent with* air travel, not activities *nonessential to* air travel.

"Airport-related" seems to be simply a tag for what the Board wishes to approve in its discretion, as indicated by its approval of the Christian Science Reading Room, the endangered species display, newsstands, and the mayor's message in each terminal building. Yet this content discrimination easily could be circumvented, by an organization simply printing an airport map on the back of its evangelistic literature, or giving oral directions to travelers along with an evangelistic presentation. Rather than consider such subterfuge, Jews for Jesus brought this challenge to suggest that something so easily circumvented must be wrong in principle as well as in practice.

The Board seems to find no problem with political and religious conversations between travelers or between travelers and greeters, or with fans meeting returning sports teams and newscasters filming various events including political speeches; yet the Board disapproves of the most traditional First Amendment activities by Jews for Jesus. The Board also seems to have no problem with the sale of newspapers or the offering of Christian Science literature, while seeking to ban free distribution of religious literature by Jews for Jesus.

b. *Preferring Commercial First Amendment Activities While Banning Many Pure First Amendment Activities.* The Board permits a wide variety of stores, with various commercial displays of price and product information, and each terminal building has various newsstands. Thus, the Board actually prefers commercial speech and non-expressive activities over the "preferred freedoms" of the First Amendment.

c. *Preferring Non-First Amendment Activities While Banning First Amendment Activities.* The resolution facially discriminates against "First Amendment activities" while permitting unrestricted public access for virtually any nonexpressive purpose. The only thing the Board has banned on the record is First Amendment activities, hijacking, and terrorism, certainly a bizarre combination.

2. *Such Content Discrimination Is Unjustified.*

The standard for justifying governmental content discrimination was described in *Widmar v. Vincent*, 454 U.S. 268 (1981), as the compelling interest test:

> Here UMKC has discriminated against student groups and speakers based on their desire to use a generally open forum to engage in religious worship and discussion. . . . In order to justify discriminatory exclusion from a public forum based on the religious content of a group's intended speech, the University must therefore satisfy the standard of review appropriate to content-based exclusions. It must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end. See *Carey v. Brown*, 447 U.S. 455, 461, 464-465 (1980).

Id. at 269-70.

a. *No Compelling Interest Threatened.* The Board has not shown, and cannot show, that its amorphous ban is narrowly drawn to serve a compelling interest. Jews for Jesus does not question the compelling nature of the governmental interest in preventing hijacking and terrorism; but the danger comes from public access rather than expressive activities. The actual threat to the airport's interest in controlling crowds that arises from these First Amendment activities is insubstantial; otherwise the Board would restrict public access or would restrict airport-related First Amendment activities and unrelated commercial activities. The absence of any real threat from First Amendment activities is evident in the practice of other airports in allowing such activities.

b. *No Narrowly Drawn Means Used.* Every perceived danger raised by the Board results from activities other than such "First Amendment activities" as Jews for Jesus practices—and yet the Board does not use the less burdensome means of restricting the real cause of the threat. That real cause is unrestricted public access, and one narrowly drawn means of countering the perceived danger is restricting public access—particularly non-airport-related public access. Other narrowly drawn means include reasonable time, place, and

manner restrictions, such as the FAA regulations described *supra*. However, LAX has yet to demonstrate a problem that requires correction.

B. The Airport Ban Constitutes Religious Discrimination against Other Religions in Favor of the Christian Science Religion.

1. *The Ban Constitutes Religious Discrimination.*

The Board's ban on "First Amendment activities" has been applied to permit continuation of the Christian Science Reading Room, continuation of religious conversations between passengers and greeters, and continuation of religious activities such as silent prayer. However, it forbids other religious activities such as evangelism by Jews for Jesus.

This constitutes religious discrimination in violation of the First Amendment. This Court resolved a similar issue, involving a registration and reporting requirement that restricted some religions but not others, in *Larson v. Valente*, 456 U.S. 228, 255 (1982). The decision there struck down religious discrimination under the Establishment Clause:

> The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.

Id. at 244.

> It is plain that the principal effect of the fifty per cent rule in 309.515, subd. 1(b), is to impose the registration and reporting requirements of the Act on some religious organizations but not on others. . . . But this statute does not operate evenhandedly, nor was it designed to do so: The fifty per cent rule . . . effects the *selective* legislative imposition of burdens and advantages upon particular denominations.

Id. at 253-54. A decision striking down discrimination between religious and secular organizations, in their access to public university facilities, was *Widmar v. Vincent*, 454 U.S. at 269. Earlier decisions struck down similar discrimination between various religions, in *Fowler v. Rhode Island*, 345 U.S. 67, 69 (1953) (under First Amendment), and *Niemotko v.*

Maryland, 340 U.S. 268, 272 (1951) (under equal protection for First Amendment rights).

2. *Such Religious Discrimination Is Unjustified.*

This Court in *Larson* and *Widmar* applied the compelling interest test to religious discrimination. 456 U.S. at 246-51;[56] 454 U.S. at 270. As discussed in Parts I(A)(5) and III(A)(2), the Board does not face any nonspeculative threat to a compelling interest, and has not employed the least restrictive means. Thus, the Board by religious discrimination has violated the Establishment Clause and the Equal Protection Clause.

CONCLUSION

For these reasons, the Court should affirm the judgment of the U.S. Court of Appeals for the Ninth Circuit.

Respectfully submitted,

JAY ALAN SEKULOW
60 Haight Street
San Francisco, California 94102
Tel.: (415) 864-2600

ANDREW J. EKONOMOU
(Counsel of Record)
515 Rhodes-Haverty Building
134 Peachtree Street, N.W.
Atlanta, Georgia 30303
Tel.: (404) 221-1000

WENDELL R. BIRD
1144 Monarch Plaza
3414 Peachtree Road, N.E.
Atlanta, Georgia 30326
Tel.: (404) 264-9400

BARRY A. FISHER
DAVID GROSZ
2049 Century Park East
Los Angeles, California 90067
Tel.: (213) 557-1077

Of Counsel:
STUART J. ROTH
230 Peachtree Street
Atlanta, Georgia 30303
Tel.: (404) 522-7188

Attorneys for Respondents

56. The test in *Larson* was as follows:
> Consequently, that rule must be invalidated unless it is justified by a compelling governmental interest, cf. Widmar v. Vincent, 454 U.S. 263, 269-270 (1981), and unless it is closely fitted to further that interest, Murdock v. Pennsylvania, 319 U.S. 105, 116-117 (1943).

Id. at 247.

APPENDICES

		Page
A.	City of Los Angeles Charter (Excerpts)	A-1
B.	LAX Resolution No. 13787 (Excerpts)	A-2
C.	Opinion of the United States Court of Appeals for the Ninth Circuit	A-4
D.	Opinion of the United States District Court	A-13

APPENDIX A. CITY OF LOS ANGELES CHARTER (EXCERPTS)

Article XXIV, section 238.8:

The Board shall have power to grant franchises, permits and licenses to, and to enter into leases with, any person, firm or corporation, or agency of the government for the use of any municipally owned or controlled airport or any part of facility thereof, for the promotion and accommodation of air commerce and air navigation, or use incidental thereto, together with the right to use said airport in common with others as necessary to the right granted. (Amended, 1951.)

The Board shall likewise have power to enter into leases with any person, firm or corporation for purposes other than for the promotion and accommodation of air commerce and air navigation covering any portion of the airport property whenever the Board shall determine that the use of such portion of the Airport property is not necessary for the promotion and accommodation of air commerce and air navigation or use incidental thereto.

Article XXIV, section 239.5:

Whenever it shall be determined by the Board by order that certain parts of any airport owned, operated or controlled by the city may not be required at such time for use in connection with, or for the promotion and accommodation of air commerce and air navigation, the general manager shall have power to issue revocable permits to use limited portions of such space for any and all purposes which shall not interfere with air commerce or air navigation and not inconsistent with any trust upon which such land may be held by the City of Los Angeles. Every such permit shall first be approved by the Board and shall prescribe that it shall be revocable, without compensation to the lessee or permittee, upon due notice to be stated therein, such notice in no case to exceed one year.

APPENDIX B. LAX RESOLUTION NO. 13787 (EXCERPTS)

NOW, THEREFORE, BE IT RESOLVED by the Board of Airport Commissioners that the Central Terminal Area at Los Angeles International Airport is not open for First Amendment activities by any individual and/or entity;

BE IT FURTHER RESOLVED that the Central Terminal Area at Los Angeles International Airport is only to be used for the promotion and accommodation of air commerce and air navigation or uses incidental thereto unless the Board of Airport Commissioners makes the appropriate findings pursuant to Charter Section 238.8 that a portion of said area is not currently required for the promotion or accommodation of air navigation or uses incidental thereto; and

BE IT FURTHER RESOLVED that after the effective date of this Resolution, if any individual and/or entity seeks to engage in First Amendment activities within the Central Terminal Area at Los Angeles International Airport, said individual and/or entity shall be deemed to be acting in contravention of the stated policy of the Board of Airport Commissioners in reference to the uses permitted within the Central Terminal Area at Los Angeles International Airport; and

BE IT FURTHER RESOLVED that if any individual or entity engages in First Amendment activities within the Central Terminal Area at Los Angeles International Airport, the City Attorney of the City of Los Angeles is directed to institute appropriate litigation against such individual and/or entity to ensure compliance with this Policy statement of the Board of Airport Commissioners; and

BE IT FURTHER RESOLVED if any entity or individual seeks to engage in First Amendment activities in the vicinity of the Central Terminal Area, those activities must be conducted only on the sidewalks in front of the ticketing buildings and in such a manner so as to not interfere with other persons; and

BE IT FURTHER RESOLVED that Department management is directed to monitor the coduct of any First Amendment activities on the sidewalks in front of the ticketing buildings and report periodically to the Board regarding such activities in order for the Board to ascertain whether any restrictions should be implemented concerning said activities . . . .

APPENDIX C. OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JEWS FOR JESUS, INC. *et al.*, *Plaintiffs/Counter-defendants/Appellees*,	No. 85-5808
v.	D.C. No. CV 84-5268-ER
THE BOARD OF AIRPORT COMMISSIONERS OF THE CITY OF LOS ANGELES, *et al.*, *Defendants/Counter-claimants/Appellants.*	OPINION

Before: SNEED, ANDERSON, and ALARCON, Circuit Judges. ALARCON, Circuit Judge.

Appellants Board of Airport Commissioners and City of Los Angeles appeal the district court's summary judgment in favor of appellees Jews for Jesus, Inc. and Alan Snyder. The district court found that: (1) the Central Terminal Area at Los Angeles International Airport (the interiors of the eight passenger terminals) is a traditional public forum; and (2) Resolution 13787 which prohibits all First Amendment activities within the Central Terminal Area is unconstitutional on its face. The Board appeals primarily because it disagrees with the district court's finding that the Central Terminal Area is a public forum. We affirm.

I. BACKGROUND

Plaintiffs and appellees (hereinafter Jews for Jesus) are Jews for Jesus, Inc., a non-profit religious corporation, and Alan Howard Snyder, a minister of the Gospel for Jews for Jesus. The defendants and appellants (hereinafter the Board) are the City of Los Angeles and the Board of Airport Commis-

sioners of the City of Los Angeles, as individuals and as operator of Los Angeles International Airport (hereinafter LAX). The Board, pursuant to City of Los Angeles Charter § 238.4, manages and controls all airports owned by the City of Los Angeles including LAX.

On July 13, 1983, the Board adopted Resolution No. 13787 (hereinafter the Resolution) which states in part:

> NOW, THEREFORE BE IT RESOLVED by the Board of Airport Commissioners that the Central Terminal Area at Los Angeles International Airport is not open for First Amendment activities by any individual and/or entity;
>
> * * * *
>
> BE IT FURTHER RESOLVED that if any individual or entity engages in First Amendment activities within the Central Terminal Area at Los Angeles International Airport, the City Attorney of the City of Los Angeles is directed to institute appropriate litigation against such individual and/or entity to ensure compliance with this Policy statement of the Board of Airport Commissioners
>
> . . . .

On July 6, 1984, Snyder was distributing free religious literature on a pedestrian walkway in the Central Terminal Area (hereinafter CTA) at LAX when he was approached by a uniformed Department of Airports peace officer. The officer showed Snyder a copy of the Resolution, explained that Snyder was violating the Resolution, and asked Snyder to leave. The officer warned Snyder that if he refused to leave the City would take legal action against him. Snyder stopped distributing the leaflets and immediately left the airport terminal.

On July 17, 1984, Jews for Jesus filed suit in district court seeking a declaration of their rights to distribute religious literature in public areas in the CTA. Jews for Jesus challenged the constitutionality of the Resolution under both the Federal and California Constitutions on three grounds: (1) that it is unconstitutional on its face because it totally bans First Amendment activities in a *public forum*; (2) that the Resolution is unconstitutional as applied to plaintiffs because

it has only been used to ban certain kinds of communicative conduct such as leafletting by Jews for Jesus; and (3) that it is unconstitutionally vague and overbroad because the term "First Amendment activities" does not give guidance to officials or the public as to what activity is prohibited.

The matter came before the district court for trial on January 6, 1985. Counsel for all parties orally stipulated to the facts and the district court treated the trial briefs as cross-motions for summary judgment without objection from the parties. The district court ruled that the CTA is a traditional public forum, declared the total ban on First Amendment activities unconstitutional on its face, and declined to reach the other issues raised by Jews for Jesus.

II. STANDARD OF REVIEW

Because the parties stipulated to the facts below, there are no factual issues on appeal. This court reviews *de novo* the district court's application of the law to the facts on free speech questions. *Carreras v. City of Anaheim*, 768 F.2d 1039, 1042 n.2 (9th Cir. 1985).

III. DISCUSSION

The United States Supreme Court recently enunciated the proper analysis for a First Amendment issue. First, the court must decide whether the challenged activity or speech is protected by the First Amendment, for, if it is not, the court need go no further. *Cornelius v. NAACP Legal Defense & Educational Fund, Inc.*, 105 S. Ct. 3439, 3446 (1985). If the speech is protected, the court must identify the nature of the forum, because the extent to which the government may limit access depends on whether the forum is public or nonpublic. *Cornelius*, 105 S. Ct. at 3446-47. Finally, the court must assess whether the justifications for exclusion from the relevant forum satisfy the requisite standard. *Cornelius*, 105 S. Ct. at 3447.

The Board does not dispute that distribution of literature is a form of communication protected by the First Amendment. *United States v. Grace*, 461 U.S. 171, 176 (1983); *Lovell v. Griffin*, 303 U.S. 444 (1938); *Rosen v. Port of Portland*, 641

F.2d 1243, 1245 (9th Cir. 1981). Both parties agree that the determinative legal issue in this case is whether the CTA is a public forum. That determination will provide the standard we must apply when reviewing the constitutionality of the Resolution.

Jews for Jesus argue that the central terminal areas in airports are traditional public forums open to free expression. The Board asserts that a traditional public forum analysis is inapplicable because the CTA at LAX is a nonpublic area which has not been opened to First Amendment expression by the Board. The Board contends that it has operated the terminal facilities solely for airport-related purposes and has neither created a forum for expressive purposes nor opened the area for the debate of issues of public interest unrelated to the airport's intended uses. The Board's reliance on recent Supreme Court decisions in *Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37 (1983), and *Cornelius*, 105 S. Ct. 3439, is misplaced. These cases do not concern the determination of traditional public forums. They address the separate and distinct issue whether governmental facilities that are *not* traditional public forums have been *opened* for First Amendment activities. *See Perry Education Association*, 460 U.S. at 46 (interschool mail system is not a traditional public forum); *Cornelius*, 105 S. Ct. at 3450 (the Combined Federal Public Campaign literature is not a traditional public forum).

The Supreme Court recently described traditional public forums as "those places which 'by long tradition or by government fiat have been devoted to assembly and debate.' " *Cornelius*, 105 S. Ct. at 3449, *quoting Perry Education Association*, 460 U.S. at 45. "Public streets and parks fall into this category." *Cornelius*, 105 S. Ct. at 3449. A principal purpose of traditional public forums is the free exchange of ideas. *Cornelius*, 105 S. Ct. at 3448. "In such places, the government's ability to permissibly restrict expressive conduct is very limited: the government may enforce reasonable time, place, and manner regulations as long as the restrictions 'are content-

neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.' " *Grace*, 461 U.S. at 177, *quoting Perry Education Association*, 460 U.S. at 45. "Additional restrictions such as an absolute prohibition on a particular type of expression will be upheld only if narrowly drawn to accomplish a compelling governmental interest." *Grace*, 461 U.S. at 177.

This court, like a number of other circuits, has addressed the First Amendment forum issue in the context of airport terminals and concluded that airport terminal buildings are public forums open to First Amendment activity. In *Rosen v. Port of Portland*, 641 F.2d 1243 (9th Cir. 1981), the chairman of Jews for Jesus challenged an ordinance and implementing regulations enacted by the Port of Portland that required those persons seeking to "exercise . . . the fundamental constitutional right of free expression" at the Portland International Airport terminal to register in advance and identify their sponsor. *Id.* at 1245 & n.2. The district court upheld the ordinance and we reversed. We observed in *Rosen* that "[t]he first amendment is to be given full effect in the public areas of airport terminal buildings," *id.* at 1245, and held both the advance notice and the identification provisions of the ordinance unconstitutional. *Id.* at 1252.

In *Rosen* we relied on our earlier ruling in *Kuszynski v. City of Oakland*, 479 F.2d 1130 (9th Cir. 1973), and cited with approval a Seventh Circuit decision, *Chicago Area Military Project v. City of Chicago*, 508 F.2d 921 (7th Cir.), *cert. denied*, 421 U.S. 992 (1975) (hereinafter *CAMP*). The ordinance challenged in *Kuszynski* provided that "[t]he use of the Airport for the purpose of exercising the right of free expression and communication . . . shall not be allowed to impair or interfere with the transportation function of the airport. The exercise of such rights shall be in accordance with [certain rules and regulations]." *Kuszynski*, 479 F.2d at 1130-31. Among other things, the regulations required the approval of the Oakland Airport manager before an exercise of First Amendment rights and limited leafletting to a period of four

hours. In a brief opinion, we concluded: "Since the airport is public property . . . free speech may be abridged only by regulations narrowly drawn to serve legitimate interests of the general public who use the airport." *Kuszynski*, 479 F.2d at 1131. We found the ordinance invalid and ordered the district court to "enjoin the enforcement of those portions of the ordinance not found to be reasonably necessary for the management of the airport." *Id.*

The Seventh Circuit's decision in *CAMP*, 508 F.2d 921, contains an extensive analysis of the forum issue which we find persuasive. The court in *CAMP* rejected many of the same arguments now before this court and held that the publicly owned and operated O'Hare Airport could not flatly bar the distribution of leaflets in public areas inside the terminal buildings.

The City of Chicago in *CAMP* argued that it had not opened O'Hare to free speech activities. The City claimed "that the public receives a limited invitation to use O'Hare Airport for travel purposes only." *CAMP*, 508 F.2d at 925. The Seventh Circuit found that these contentions were neither "supported by the evidence" nor "realistic." *Id.* The court analogized the airport terminal to traditional public forums and concluded the terminal was a public forum where First Amendment activity could not be totally banned.

> [T]he plaintiffs do not here claim any right to distribute leaflets on airplanes or in other privately owned or leased places but only in the spacious, city-owned common areas which resemble those public thoroughfares which have been long recognized to be particularly appropriate places for the exercise of constitutionally protected rights to communicate ideas and information.

Id., citing Hague v. CIO, 307 U.S. 496, 515-16 (1939).

More recent appellate decisions are in accord with the holdings in *Rosen*, *Kuszynski*, and *CAMP*. In *United States Southwest Africa/Nambia Trade & Cultural Council v. United States*, 708 F.2d 760 (D.C. Cir. 1983), the District of Columbia Circuit categorized the public areas of Washington National Airport (National) and Dulles International Airport

(Dulles) as "public forums" for First Amendment purposes. *Id.* at 764. The District of Columbia Circuit quoted with approval the Seventh Circuit's analogy in *CAMP* of airport terminals to public thoroughfares. *Id.* The court also observed that "[w]hatever commonsense differences may exist in the forms of free speech allowable in airports, as opposed to parks and streets, an unusual consensus of judicial, legislative, and administrative opinion would classify the public areas of National and Dulles squarely within the public forum family." *United States Southwest Africa*, 708 F.2d at 766.

The Fifth Circuit similarly found the Dallas-Fort Worth Airport complex to be a public forum in *Fernandes v. Limmer*, 663 F.2d 619 (5th Cir. 1981). In response to Dallas-Fort Worth's claim that "the airport ought not be regarded as a public forum," the Fifth Circuit stated: "It is now generally well established that airport terminals owned and administered by governmental entities are public forums in which efforts to regulate speech or religious activity must comport with First Amendment guarantees." *Id.* at 626. The *Fernandes* court concluded that "in view of the lack of restrictions on entry by the general public, and the commercial, street-like character of the terminal concourses . . . the [Dallas-Fort Worth] terminal buildings must be treated as public forums." *Id.* at 627. *See also Wolin v. Port of New York Authority*, 392 F.2d 83, 89 (2d Cir.) (the interior of the Bus Terminal operated by the New York Port Authority is traditionally a place for exercise of First Amendment rights), *cert. denied*, 393 U.S. 940 (1968).

Since *Rosen* and *Kuszynski*, the law of this circuit has been that an airport complex is a traditional public forum. Every circuit which has confronted the issue has reached the same conclusion. We hold that the Central Terminal Area at LAX is a traditional public forum.

Because the CTA is a traditional public forum, the Board's resolution banning all First Amendment activity can be upheld only if it was narrowly drawn to accomplish a compelling governmental interest. *Grace*, 461 U.S. at 177; *Cornelius*, 105

S. Ct. at 3448. The Board sets forth only one governmental interest to justify the total exclusion of First Amendment activity in the CTA: "The Los Angeles City Charter requires the Board to operate all of its properties for promotion and accommodation of air navigation and air commerce and uses incidental thereto." The Board has not shown that its desire to limit the uses of the terminal facilities to airport-related purposes is sufficiently compelling to justify the uniform and absolute prohibition on all First Amendment activity in the CTA. In fact, the parties stipulated that "[i]n distributing the religious literature [in the CTA], Snyder was not blocking any entrance, exit, stairway, escalator, elevator, door, or otherwise inhibiting the free flow of pedestrian traffic [in the CTA]" and that "Snyder was not touching, annoying, blocking, obstructing, or otherwise harassing any other person present in the immediate vicinity of his location on the pedestrian walkway [in the CTA]." *See Fernandes*, 663 F.2d at 626 (that the passageways of the Dallas-Fort Worth Airport are crowded and narrow does not justify prohibiting Krishna followers from distributing literature and soliciting funds); *Wolin*, 392 F.2d at 91 (absolute prohibition of leafletting at the New York Port Authority's Bus Terminal cannot be defended on the ground that it would obstruct traffic).

The fact that the CTA is a traditional public forum does not preclude the Board from imposing restrictions on the distribution of leaflets. The Board is free to promulgate reasonable time, place, and manner restrictions on the distribution of literature in the CTA. *See Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981); *CAMP*, 508 F.2d at 926 (airport authorities may prohibit leafletting at check-in counters, arrival and departure gates, or any other areas where it is shown to substantially interfere with rapid and efficient airport operations). Because the 1983 resolution proscribes all First Amendment activity rather than setting forth reasonable time, place, and manner restrictions on such activity, it is unconstitutional on its face.

IV. CONCLUSION

We hold that the distribution of literature by Jews for Jesus is protected speech and that the Central Terminal Area of the Los Angeles International Airport is a public forum. The governmental interests advanced by the Board are not sufficiently compelling to justify the total exclusion of those persons wishing to exercise free speech within the CTA.

The Board has conceded that, in the event Jews for Jesus prevail in this litigation, they are entitled to recover their attorneys' fees pursuant to 42 U.S.C. § 1988. Since we have concluded that the Board's resolution is unconstitutional, Jews for Jesus are the prevailing parties and shall recover reasonable attorneys' fees as part of their costs. *See Hensley v. Eckerhart*, 461 U.S. 424 (1983); *Douglas v. City of Jeannette*, 319 U.S. 157, 162 (1943).

APPENDIX D. OPINION OF U.S. DISTRICT COURT

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA

JEWS FOR JESUS, INC. *et al.*,	)	
	)	No. CV 84-5268-ER
	)	MEMORANDUM DECISION
Plaintiffs,	)	AND JUDGMENT
	)	
v.	)	
	)	
THE BOARD OF AIRPORT COMMISSIONERS OF THE CITY OF LOS ANGELES, *et al.*,	)	
Defendants	)	

[2] The above captioned matter came before this Court for trial without a jury on January 8, 1985. Prior to trial the Court indicated to counsel its desire to treat the trial briefs as cross motions for summary judgment. None of the parties planned to call witnesses at trial and counsel for all defendants orally stipulated to the facts stated in plaintiffs' Exhibit #1 ("Stipulated Facts for Trial"). As there were no genuine issues of material fact to be decided at trial and without objection from the parties, the oral argument was held as argument on cross motions for summary judgment on the constitutionality of Board of Airport Commissioners of the City of Los Angeles Resolution No. 13787.*

FACTS

Defendant Board of Airport Commissioners of the City of Los Angeles ("Board of Airport Commissioners"), pursuant to City of Los Angeles Charter § 238.4, manages and controls

---

* The stipulated Facts for Trial and the text of Resolution No. 13787 are attached hereto as Appendix 1 and Appendix 2, respectively.

all airports owned by the City of Los Angeles including Los Angeles International Airport ("LAX").

On July 13, 1983 at a special meeting the Board of Airport Commissioners adopted Resolution No. 13787 ("the Resolution") which states in part:

> NOW, THEREFORE BE IT RESOLVED by the Board of Airport Commissioners that the Central Terminal Area at Los Angeles International Airport is not open for First Amendment activities by any individual and/or entity;[3]
>
> * * * *
>
> BE IT FURTHER RESOLVED that if any individual or entity engages in First Amendment activities within the Central Terminal Area at Los Angeles International Airport, the City Attorney of the City of Los Angeles is directed to institute appropriate litigation against such individual and/or entity to ensure compliance with this Policy statement of the Board of Airport Commissioners;

Plaintiffs challenge the constitutionality of the Resolution on three grounds: (1) that it is unconstitutional on its face because it totally bans First Amendment activity in a public forum; (2) that the Resolution is unconstitutional as applied to plaintiffs because it only has been used to ban certain kinds of communicative conduct such as leafletting by plaintiffs; and (3) that it is unconstitutionally vague and overbroad because the term "First Amendment activities" does not give guidance to officials or the public as to what activity is prohibited. Finding the Resolution unconstitutional on its face, this Court does not reach the second and third challenges to the Resolution.

Plaintiffs are Jews for Jesus, a non-profit religious corporation, and Alan Howard Snyder, a minister of the Gospel for Jews for Jesus. On Friday, July 6, 1984 Snyder was distributing free religious literature at LAX when he was approached by a uniformed Department of Airports peace officer who showed Snyder a copy of the Resolution, explained that Snyder was in violation thereof, and asked Snyder to leave. The

officer warned Snyder that if he refused to leave the City would take legal action against him. Snyder stopped distributing the leaflets and immediately left the airport terminal.[4]

CONSTITUTIONALITY OF THE RESOLUTION

The First Amendment stops government from passing laws abridging the freedom of speech and the right of the people peaceably to assemble. *U.S. Const.* Amend.I. At least since 1939 it as been clear that government cannot ban First Amendment activity totally in traditionally public places. First Amendment activities in such places are, however, subject to valid time, place and manner restrictions. *See e.g. Heffron v. International Society for Krishna Consciousness*, 452 U.S. 640, 101 S.Ct. 2559, 69 L.Ed.2d 298 (1981). As the Supreme Court wrote in *Hague v. Committee for Industrial Organization*, 307 U.S. 496, 59 S.Ct. 954, 83 L.Ed. 1423 (1939):

> Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens. *The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all*; it is not absolute, but relative and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; *but it must not, in the guise of regulation, be abridged or denied.*

301 U.S. at 964, 59 S.Ct. at 515-16 (emphasis added).

The resolution being challenged by plaintiffs here completely bans First Amendment activity in the Central Terminal of LAX and therefore must be struck down if the Central Terminal is a public forum like the streets and parks discussed in *Hague*. The question then facing the Court is whether a [5] municipally owned and operated airport termi-

nal is a public forum. The question is easily answered. Numerous appellate opinions have held that airport terminals are public forums. *Kuszynski v. City of Oakland*, 479 F.2d 1131 (9th Cir. 1973) is the seminal case on the subject. The ordinance challenged and struck down in *Kuszynski* provided that "The use of the Airport for the purpose of exercising free expression and communication . . . shall not be allowed to impair or interfere with the transportation function of the airport. The exercise of such rights shall be in accordance with [certain rules and regulations]." Among other things, the regulations required approval of the airport manager before an exercise of First Amendment rights and limited leafleting to four hours. In a brief opinion the court concluded, "Since the airport is public property . . . free speech may be abridged only by regulations narrowly drawn to serve legitimate interests of the general public who use the airport." *Id.* at 1131. The court found the ordinance invalid because there was no showing that the restrictions were reasonable. The court ordered the district court to "enjoin the enforcement of those portions of the ordinance not found to be reasonably necessary to airport management." *Id.*

This Court need go no further in analyzing the Board of Airport Commissioner's case. It is obvious from the one page opinion of the Ninth Circuit in *Kuszynski* that airports are public forums. While it belabors the obvious to address the question further, the Court will briefly discuss other precedents supportive of plaintiffs' argument. [6]

In *Rosen v. Port of Portland*, 641 F.2d 1243 (9th Cir. 1981) the Ninth Circuit wrote: "The first amendment is to be given full effect in public areas of airport terminal buildings . . . . However, the regulation of activity that interferes with the normal use of an airport facility is a proper governmental function." *Id.* at 1245-46. In *Rosen* the appellate court reversed a district court and found the restrictions imposed by the Port of Portland were unconstitutional. "Both the advance notice and the identification provisions of the challenged ordinance violate the United States Constitution

. . . . persons desiring to exercise their free speech rights may not be required to give advance notice and to identify themselves and their sponsors to Port authorities." *Id.* at 1252. It is obvious that if Portland cannot require advance notice by and identification of leafleters, Los Angeles cannot ban them all together. LAX is a public forum and the challenged Resolution is unconstitutional. *Accord S.W. Africa/Namibia Trade & Cult. Coun. v. U.S.*, 708 F.2d 760 (D.C. Cir. 1983) (National and Dulles airports public forums); *Fernandes v. Limmer*, 663 F.2d 619 (5th Cir. 1981) (Dallas-Fort Worth Airport a public forum). In *Chicago Area Military Project v. City of Chicago*, 508 F.2d 921 (7th Cir. 1975) the City of Chicago claimed "that the public receives a limited invitation to use O'Hare Airport for travel purposes only" but the 7th Circuit found that argument was neither supported by the evidence nor . . . realistic" and held that O'Hare Airport is a public forum. 508 F.2d at 925. The City of Los Angeles makes the same claim as the City of Chicago did. It is no more persuasive in 1985 [7] than it was in 1975.

When asked what makes LAX, the third busiest airport in the world, different from National, Dulles, Dallas-Fort Worth and O'Hare airports, defendants' counsel stated that those airports chose to be public forums by enacting time, place, and manner restrictions and LAX did not. This argument, while creative, is supported neither by fact nor law.

As a factual matter, the City has stipulated that "a variety of religious and/or political groups have utilized the interior area of terminals at LAX, including the pedestrian walkways located therein, to distribute literature, solicit funds, and communicate ideas." The City further stipulated that "the interior of terminal areas at LAX, including the pedestrian walkways located therein, have been utilized on a number of occasions by print, television and radio media for the purpose of filming, photographing and/or interviewing public figures." The City also stipulated to other uses of LAX for non-travel related matters. *See* Appendix 1.

More importantly, the contention that an airport is not a public forum unless the City consents to it being such is without legal support. A similar argument was rejected by the Second Circuit when it faced the question "May the Port of New York Authority bar the use of its terminal to all exercises of First Amendment rights?" *Wolin v. Port of New York Authority*, 392 F.2d 83 (2nd Cir. 1968). The answer was no for the Port Authority and it is no for the Board of Airport Commissioners. Streets, parks and airports do not become public forums because government consents to their use as such. They are public [8] forums, as the Supreme Court explained in *Hague*, because they are traditional gathering places for the citizenry. They are held in trust by government for public use.

In recent years the Supreme Court has grappled with difficult questions of what constitutes a public forum. *E.g., Members of City Council v. Taxpayers for Vincent*, ___ U.S. ___ 104 S.Ct. 2118 (1984) (lamposts); *U.S. Postal Service v. Council of Greenburgh*, 453 U.S. 114, 101 S.Ct. 2676 (1981) (mailboxes). Despite the difficulty in applying public forum analysis to all government property "generally an analysis of whether property is a public forum provides a workable analytical tool." *Members of City Council v. Taxpayers for Vincent*, 104 S.Ct. at 2134 n.32. Public forum analysis is a workable tool here. This is not a difficult case. An airport used by an estimated 60 million people a year is a public forum. First amendment activity cannot be banned at LAX. Resolution No. 13787 is unconstitutional. Defendants are enjoined from enforcing it.

Judgment is entered for plaintiffs.

DATED: March 25, 1985.

EDWARD RAFEEDIE
United States District Judge

[Appendices omitted consisting of stipulated facts and resolution]

CERTIFICATE OF SERVICE
(Pursuant to S.Ct.R. 28.5(b))

I hereby certify, as a member of the bar of the Supreme Court of the United States, that on this 9th day of January, 1987, three copies of the brief of respondents, and a statement concerning first class mailing. were served by first class mail with the envelope duly addressed and with postage prepaid to the attorneys of record of all other parties of record as follows:

James R. Kapel
Assistant City Attorney
#1 World Way
Los Angeles, CA 90009

I further certify that service is not required on any other persons, and that all parties required to be served have been served. Rule 28.

_____

Andrew J. Ekonomou
Attorney for Respondents

Supreme Court, U.S.
FILED
FEB 24 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-104

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1986

THE BOARD OF AIRPORT COMMISSIONERS
OF THE CITY OF LOS ANGELES, et al.,
Petitioners,

VS.

JEWS FOR JESUS, INC., AND ALAN HOWARD SNYDER,
a.k.a. AVI SNYDER
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONERS' REPLY BRIEF

JAMES K. HAHN, City Attorney
JAMES H. PEARSON, Senior
Assistant City Attorney
JAMES R. KAPEL,*
Assistant City Attorney
#1 World Way
Los Angeles, CA 90009
(213) 646-3260
Attorneys for Petitioners
**Counsel of Record*

Bowne of Los Angeles, Inc., Law Printers. (213) BOWNE CO

TABLE OF CONTENTS

Page

I.

GOVERNMENT PROPERTY MAY BE PRESERVED FOR ITS INTENDED AND DEDICATED PURPOSES ONLY AND IS NOT REQUIRED TO BE USED FOR UNRELATED ACTIVITIES 1

II.

THE INTERIORS OF THE AIRPORT TERMINAL FACILITIES AT LAX ARE NOT TRADITIONAL PUBLIC FORUMS DEDICATED TO PUBLIC ASSEMBLY AND DEBATE 5

III.

THE INTERIORS OF THE AIRPORT TERMINAL FACILITIES AT LAX HAVE NOT BEEN OPENED OR DESIGNATED AS PUBLIC FORUMS 11

IV.

PETITIONERS' PRACTICE OF LIMITING THE USES OF THE INTERIORS OF THE TERMINAL FACILITIES AT LAX TO AIRPORT-RELATED PURPOSES ONLY IS A REASONABLE WAY TO OPERATE THE AIRPORT 13

V.

PETITIONERS' POLICY AND PRACTICE OF LIMITING THE USES OF THE INTERIORS OF THE TERMINAL FACILITIES AT LAX TO AIRPORT-RELATED PURPOSES ONLY DOES NOT RESULT IN IMPERMISSIBLE DISCRETION OR CONTENT OR RELIGIOUS DISCRIMINATION 15

Page

VI.

PETITIONERS ARE NOT CONSTITUTIONALLY REQUIRED TO USE THE INTERIORS OF THE AIRPORT TERMINAL FACILITIES AT LAX AS PUBLIC FORUMS BUT, RATHER, CAN RESERVE THOSE FACILITIES FOR THEIR INTENDED AIRPORT-RELATED PURPOSES ONLY 18

CONCLUSION 19

TABLE OF AUTHORITIES

Page

Chicago Area Military Project (CAMP) v. Chicago, 508 F.2d 921 (7th Cir., 1975) 8

City Coun v. Taxpayers for Vincent, 466 U.S. 789 (1984) 6, 9, 14

Clark v. Community for Creative Non-Violence, 52 U.S.L.W. 4987, 468 U.S. ____, 82 L.Ed.2d 221, 104 S.Ct. ____ (1984) 14

Cornelius v. N.A.A.C.P., 53 U.S.L.W. 5116, 87 L.Ed.2d 567 (1985) 2, 3, 4, 5, 7, 8, 11, 13, 15

Grayned v. City of Rockford, 408 U.S. 104 (1972) 7

Greer v. Spock, 424 U.S. 828 (1976) 2, 8, 9, 18

Heffron v. ISKCON, 452 U.S. 640 (1981) 2, 14

Kuszynski v. City of Oakland, 479 F.2d 1130 (9th Cir., 1973) 8

Perry Ed. Assn. v. Perry Local Ed. Assn., 460 U.S. 37 .....*passim*

U.S. v. Grace, 461 U.S. 171 (1983) 6, 8, 9, 10, 14, 19

U.S. Postal Service v. Greenburgh Civic Assn., 453 U.S. 114 (1981) 2, 8, 14, 18

U.S.S.W. Africa/Namibia Trade Cultural Council v. U.S., 708 F.2d 760 (1983) 8, 11

Widmar v. Vincent, 454 U.S. 263 (1981) 5, 11

Constitution

United States Constitution, First Amendment ... 2, 3, 4, 12, 17

No. 86-104

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1986

THE BOARD OF AIRPORT COMMISSIONERS
OF THE CITY OF LOS ANGELES, et al.,
Petitioners,

VS.

JEWS FOR JESUS, INC., AND ALAN HOWARD SNYDER,
a.k.a. AVI SNYDER
Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITIONERS' REPLY BRIEF

I.

GOVERNMENT PROPERTY MAY BE PRESERVED FOR ITS INTENDED AND DEDICATED PURPOSES ONLY AND IS NOT REQUIRED TO BE USED FOR UNRELATED ACTIVITIES.

This case involves the ability of a government to restrict the uses of the interiors of the buildings under its control to those particular purposes to which the facilities were dedicated and intended and for which they are used. Specifically, the issue presented by this case is whether Petitioners constitutionally have limited the uses of the interiors of the airport terminal facilities at Los Angeles International Airport (hereinafter

"LAX" or "Airport") to their intended airport-related purposes only or whether Petitioners are required by the constitution to use those facilities for non-airport related activities.

This Court has repeatedly recognized that the government has the "power to preserve the property under its control for the use to which it is lawfully dedicated." *Greer v. Spock*, 424 U.S. 828, 836 (1976); *Perry Ed. Assn. v. Perry Local Ed. Assn.*, 460 U.S. 37, 46, 61 fn. 5.

Further, "[t]he guarantees of the First Amendment have never meant 'that people who want to propagandize protests or views have a constitutional right to do so whenever and however and wherever they please.'" *U. S. Postal Service v. Greenburgh Civic Assn.*, 453 U.S. 114, 133 (1981); *Heffron v. ISKCON*, 452 U.S. 640, 652-653 (1981).

The determinative issue in this case is whether the interiors of the airport terminal facilities at LAX are classified as public forums or nonpublic forums. That classification is the deciding factor because it determines which of two very different standards with which Petitioners must comply when making decisions regarding the uses of the interiors of those facilities. *Cornelius v. N.A.A.C.P.*, 53 U.S.L.W. 5116, 5121, 87 L.Ed.2d 567, 582-583 (1985); *Perry Local Ed. Assn. v. Perry Local Ed. Assn.*, *supra*, at p. 46.

Petitioners are charged with managing the continuous operation and development of LAX. (Joint Appendix (hereinafter "J.A."), p. 7a, para. 2.) Petitioners consistently have had a long-standing policy and practice of limiting the uses of the interiors of the airport terminal facilities at LAX to their intended airport-related purposes only. (J.A., p. 11a, paras. 18-22; p. 15a, paras. 42-43; p. 17a, paras. 50-53.) Thus, Petitioners have permitted only those activities within those facilities that directly aid the traveling public. (J.A., p. 11a, paras. 20-21; p. 17a, paras. 50-53.) In this regard, the airport terminal facilities at LAX have been operated in a manner much different from that of airports or public buildings in which the operator has allowed unrelated activities to take place. In

order to clarify Petitioners' past policy and practice with regard to the appropriate uses of LAX and the interaction with First Amendment activities, Petitioners passed Resolution No. 13787, which reiterates their prior policy and practice, except that it specifies that activities protected by the First Amendment will be permitted on the sidewalk areas outside of the terminal facilities. (J.A., p. 17a. paras. 50-53.)

In following this policy and practice, Petitioners have attempted to preserve the facilities under their control to their dedicated and intended purposes while still exhibiting a sensitivity to constitutionally protected activities by permitting those activities to take place on the sidewalks. Respondents and others, however, believe they have an absolute right to use the interiors of the terminal facilities at LAX for other than their intended purposes and assert that Petitioners cannot restrict the activities within the interiors of those facilities to their intended airport-related purposes.

Petitioners adopted their policy with the clear intent to devote the facilities under their control to airport-related purposes. The intent of this policy is reinforced by Petitioners' past practice, which has been followed consistently, of permitting only those activities to take place within the terminals that are airport-related while denying permission to conduct all others. (J.A., p. 11a, paras. 19-21; p. 15a, paras. 40-43.) There is no hint that Petitioners adopted this policy for any reason other than restricting the uses of the facilities to their intended and dedicated purposes. There is no evidence or suggestion that the policy was adopted in opposition to Respondents' particular views or to prevent the expression of any other views protected by the First Amendment. Furthermore, there is absolutely no evidence that Petitioners have ever granted permission to anyone to use the interiors of the terminal facilities in the manner proposed by Respondents.

Most relevant in setting forth the appropriate analysis and law necessary to decide the issues presented are this Court's decisions in *Perry Ed. Assn. v. Perry Local Ed. Assn.*, *supra*, and *Cornelius v. N.A.A.C.P.*, *supra*. These cases most clearly

set forth the analysis that should be used to determine if a particular government facility is capable of being limited to its intended purposes only or has been opened as a public forum.

There is no dispute about whether Respondents' religious literature distribution is an activity protected by the First Amendment. Similarly, there is no dispute about what constitutes the relevant forum at issue. Clearly, it involves the interior of the airport terminal facilities at LAX. It is access to those areas that Respondents seek and "[w]hen speakers seek general access to public property, the forum encompasses that property." *Cornelius, supra,* at p. 5119, L.Ed.2d 579.

In deciding this case it is important to remember what is not at issue. This case does not involve the exterior sidewalk areas of the Airport because literature distribution is not restricted in those areas. (J.A., p. 17a, para. 53.) Likewise, this case does not involve Respondents seeking access to hotel or motel information boards or the right to rent space to provide a waiting room or some other airport-related service because Respondents do not seek that access or right to those or similar places. This case does not involve a question of whether Respondents were denied access to the interiors of the terminal facilities at LAX because of their particular message. The record is clear that Petitioners have denied all requests by all people for such general access for non-airport related activities. (J.A., p. 11a, paras. 19-21; p. 15a, paras. 40-43.) This case does not involve a restriction that, in any way, restricts Respondents' right to use the airport for its intended airport-related purposes.

Thus, this case turns on the question of whether the interiors of the airport terminal facilities at LAX are public forums or nonpublic forums.

II.

THE INTERIORS OF THE AIRPORT TERMINAL FACILITIES AT LAX ARE NOT TRADITIONAL PUBLIC FORUMS DEDICATED TO PUBLIC ASSEMBLY AND DEBATE.

This "Court has identified three types of fora: the traditional public forum, the public forum created by government designation and the nonpublic forum." *Cornelius v. N.A.A.C.P., supra,* at p. 5120, L.Ed.2d 589. Municipal streets, parks and other open places that by tradition and government fiat are devoted to assembly and debate are traditional public forums. Other government property becomes a public forum only by a designation or opening of that place by the government as a place for "communication for use by the public at large for assembly and speech . . ." *Cornelius, supra,* at p. 5120, L.Ed.2d 580; see also *Widmar v. Vincent, supra,* at pp. 267-268. This designated public forum is not created "by inaction or by permitting limited discourse, but only by [the government] intentionally opening a non-traditional forum for public discourse." *Cornelius v. N.A.A.C.P., supra,* at p. 5120, L.Ed.2d 580. "Public property which is not by tradition or dedication a forum for public communication" is a nonpublic forum and "is governed by different standards." *Perry Ed. Assn. v. Perry Local Ed. Assn., supra,* at p. 46. In this nonpublic forum, "the State may reserve the forum for its intended purposes, communicative or otherwise . . ." *Perry Ed. Assn. v. Perry Local Ed. Assn., supra,* at p. 46.

The Ninth Circuit has held that the interiors of airport terminal facilities are traditional public forums held in trust for public assembly and discussion of public questions. Under this conclusion, no airport operator, no matter now it operates its facilities or how it attempts to limit the activities therein, could ever reserve those facilities for their intended uses only.[1] Rather, all airport operators would be required to

---

[1]Since traditional public forums are those held in trust for use by the general public for expressive purposes, the Ninth Circuit's opinion would

permit unrelated communicative activities, restraining them only by very narrowly tailored regulations that would serve a significant or compelling state interest.

Contrary to the Ninth Circuit's finding and Respondents' arguments, the interiors of the airport terminal facilities at LAX are not traditional public forums. The interiors of the terminal facilities at LAX, like the forum involved in *City Council v. Taxpayers for Vincent*, 466 U.S. 789, 814 (1984), have no "traditional right of access . . . for purposes of . . . communication comparable to that recognized in streets and parks . . ." The interiors of the facilities at LAX have no historical association with and dedication to the exercise of expressive activities. See, e.g., *U. S. v. Grace, supra*, at p. 177. There is no devotion to public assembly and debate of public questions. The Airport, like courthouses, hospitals or office buildings, was built and intended for its own respective purposes. Of course, areas within each of those buildings could be designated or opened as public forums but generally the interiors of those buildings are not held in trust to be used for purposes of assembly and debate of public questions. This conclusion is particularly clear with regard to government property that is designed and used for its non-communicative purposes because that property is generally intended for those purposes only. In all buildings, whether they were designed to permit expressive activity or not, communication takes place. Contrary to Respondents' argument, however, the fact that this communication occurs does not establish that the interior of the building is a traditional public forum or that it was opened as a forum. If the fact that communication occurred were all that was required, all buildings would be forums and the government could not reserve any of its buildings for their intended purposes only.

Both the Ninth Circuit and Respondents rely, in large part, on prior district and circuit court "airport cases" to support

---

appear to prohibit an airport operator from allowing entrance to its terminal facilities to only ticketed passengers.

their conclusions that all airport terminal facilities are traditional public forums or, at least, that the interiors of the airport terminal facilities at LAX have been opened or designated as public forums. (Resp. Br., pp. 17-19.) It is submitted that the vast majority of these lower court "airport cases" are either inapplicable or totally irrelevant to the determinative public forum/nonpublic forum issue involved in this case. Most of the lower court cases relied on by Respondents involve the review of a time, place and manner restriction, which is an entirely different issue from that presented in this case. *Cornelius v. N.A.A.C.P., supra,* at p. 5121, L.Ed.2d 584.[2] The government facilities at issue in this case are the interiors of the terminal facilities at LAX, which have been operated in a manner much different from that of many other airports or government buildings. In contrast to some airports and other government-owned buildings, Petitioners have not allowed the interiors of the terminal facilities at LAX to be used for activities that do not relate directly to the intended purposes of those facilities.[3]

---

[2]The test applicable when reviewing a time, place and manner restriction is whether the restriction is "content neutral, is narrowly tailored to serve a significant government interest, and leaves open ample alternative channels of communication." *Perry Ed. Assn. v. Perry Local Ed. Assn., supra,* at p. 46; see also *Grayned v. City of Rockford,* 408 U.S. 104, 115 (1972). This Court has clearly explained that: "[i]n addition to time, place and manner regulations, the state may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." *Perry Ed. Assn. v. Perry Local Ed. Assn., supra,* at p. 46. When the government does reserve the forum for its intended purposes only, the standard to be applied to the restriction is reasonableness and, thus, is much different from the standard applied to a time, place and manner restriction. *Perry Ed. Assn. v. Perry Local Ed. Assn., supra,* at p. 46.

[3]Petitioners limit the activities within the terminal facilities at LAX to only those that aid the traveling public. It is apparent from the photographic exhibits submitted to the trial court that the terminal facilities at LAX have not been used for indiscriminate advertising or for activities unrelated to the operation of the Airport. There are no advertising panels

A few of the lower court "airport cases" rely on the fact of public ownership or general public access as determinative of whether or not the interiors of airport terminal facilities are public forums.[4] Clearly, neither public ownership nor general public admission is determinative of the public forum/nonpublic forum issue. *Greer v. Spock, supra; Perry Ed. Assn. v. Perry Local Ed. Assn., supra,* at pp. 47-48. Likewise, it is not dispositive of the public forum/nonpublic forum issue to draw similarities between the hallways of the interiors of the airport terminal facilities at LAX to those open streets and parks of a municipality. There is no question that people use hallways, like streets and parks, to get from place to place.

---

similar to those involved in *U.S.S.W. Africa/Namibia Trade Cultural Council v. U. S.*, 708 F.2d 760 (1983), involving Dulles Airport. Unlike the forum involved in *Perry Ed. Assn. v. Perry Local Ed. Assn., supra,* the forum involved here has not been used by church groups, cub scouts, or other groups to engage in non-airport related activities. See *Perry Ed. Assn. v. Perry Local Ed. Assn., supra,* at p. 39, n. 2, 47; J.A., p. 15a, paras. 42-43.

[4]Virtually all of the lower court "airport cases" rely on *Kuszynski, supra,* and *CAMP, supra.* These cases involved the review of time, place and manner restrictions, and, therefore, are of little utility in the determinative public forum/nonpublic forum issue involved in this case.

Even if *Kuszynski* or *CAMP* were viewed as relevant to the public forum issue, the apparent logic of those cases is no longer valid. The *Kuszynski* court essentially concluded that mere public ownership was the determinative issue. *Kuszynski, supra,* at p. 1131. The analysis used by the *CAMP* court can be summarized as follows: The airport is government owned and operated, the general public is admitted to the facilities, the airport facilities can accommodate seven people conducting non-airport related activities, and, therefore, the Airport Authority must allow the Plaintiffs to conduct their activities, limited only by a time, place and manner restriction. *CAMP v. Chicago, supra,* at p. 925.

Decisions by this Court have clearly held that the factors relied on by the courts in *Kuszynski* and *CAMP* do not lead to the conclusion that government facilities must be made available as public forums. *Greer v. Spock, supra; Perry Ed. Assn. v. Perry Local Ed. Assn., supra,* at pp. 46-47. What is important is the government's intention either to limit the facilities or to open the facilities. *Cornelius v. N.A.A.C.P., supra,* at p. 5120. See also *U. S. v. Grace, supra,* at pp. 177-178, and cases cited therein; *U. S. Postal Service v. Greenburgh, supra,* at pp. 129-130.

This similarity, however, cannot create a public forum, for if it did, the interiors of all public buildings that are open to the public would be public forums.

The interior hallways of the airport terminal facilities at LAX are clearly distinguishable from the streets and sidewalks of a city. There is no historical dedication of the hallways of the terminal facilities to public assembly and debate as there is with the open streets and parks of a municipality. Cf., *City Council v. Taxpayers for Vincent, supra,* at p. 814. In this case, the hallways of the Airport are an integral part of the airport terminal facilities because they are used to get from the streets and sidewalks to particular destinations within those facilities. The distinction between a municipality's open public streets and sidewalks and the internal walkways of the airport terminal facilities at LAX becomes more obvious upon the review of this Court's decisions in *U. S. v. Grace, supra,* and *Greer v. Spock, supra.*

In *U. S. v. Grace, supra,* at p. 179, the exterior sidewalk area surrounding the Supreme Court grounds was found to be indistinguishable from any of the other sidewalks in Washington, D.C., and thus was found to be a public forum. In *Greer v. Spock, supra,* at pp. 535-537, sidewalks and streets located on the military base, although fully open to unrestricted civilian access, were distinguishable from the open streets and parks of a municipality and were found not to be public forums.[5]

---

[5]The present case presents a much stonger case for the conclusion reached in *Greer v. Spock.* In the present case, the exterior sidewalk areas of the terminal facilities at LAX, although distinguishable from the open sidewalks of a municipality, are not at issue. What is at issue are the interior hallways of the public facilities located on airport property. There is no evidence that Petitioners have abandoned their claim or right to restrict the interiors of the terminal facilities to their intended uses only. The streets and sidewalks of a military base, particularly those bases open to general public access, would appear to have more of the physical characteristics and similarities to those open streets and parks of a municipality than would the interior hallways of the airport terminal facilities at LAX. Yet those exterior sidewalk areas of army bases are not

This case involves the questions specifically left unanswered in *U. S. v. Grace*, *supra*, at p. 178, i.e., whether the interior of a building that is publicly owned and that has not been traditionally held open for expressive activities, may be preserved for its intended purposes and may have banned all other unrelated activities, including expressive activities. *U. S. v. Grace*, *supra*, at p. 178.

The interiors of the airport terminal facilities at LAX can be more easily likened to the interiors of courthouses than they can to the open streets and parks of a municipality. Courthouses, like terminal facilities, have important purposes and functions unrelated to public assembly for expressive purposes. Yet, in both, the public is generally free to enter, may talk of unrelated things, and in fact, may be there just to "pass the time." These factors no more make courthouses public forums than they do the interiors of the airport terminal facilities at LAX.

The mere fact that the interiors of the airport terminal facilities at LAX, like streets and parks, are used to get from one place to another, does not make those interiors traditional public forums. If that mere similarity were all that were necessary, then the hallways of all public buildings would be traditional public forums and the government could never reserve the interiors of buildings for their intended, non-communicative purposes. Respondents have failed to show the necessary tradition or historical dedication of the interiors of the airport terminal facilities at LAX to unrelated, communicative purposes. Without such a showing, the interiors of those terminals, dedicated to their travel-related non-communicative purposes, are not traditional public forums.

---

traditional public forums. The facts in this case present a much stronger argument for a similar conclusion.

III.

THE INTERIORS OF THE AIRPORT TERMINAL FACILITIES AT LAX HAVE NOT BEEN OPENED OR DESIGNATED AS PUBLIC FORUMS.

There is no question that the interiors of airport terminal facilities can be opened by the operator to public speech and debate. Some airport and other government buildings have clearly been opened for those purposes. See, e.g., *U.S.S.W. Africa/Namibia v. U. S., supra,* at p. 765. Such an opening, however, is not constitutionally mandated. If it were, no government property could be reserved for its intended purposes only and this Court's repeated statements that a government may reserve its facilities to their intended purposes would be meaningless. This "opening" of a facility, particularly the interior of a building dedicated to non-communicative purposes, must be accomplished by clear government action. *Cornelius v. N.A.A.C.P., supra,* at p. 5120, L.Ed.2d 580; see, e.g., *Widmar v. Vincent, supra,* at pp. 267-268. The government must intend to open and actually open its facility to speech and debate. *Cornelius v. N.A.A.C.P., supra,* at p. 5120, L.Ed.2d 580.

Clearly, Petitioners in this case have not intended to open, nor have they in fact opened, the interiors of the terminal facilities at LAX to any activities other than those that directly aid the traveling public. (J.A., p. 11a, paras. 19-21.) Rather, Petitioners have specifically limited, by both policy and practice, the uses of the interiors of the terminal facilities at LAX to only those activities that are airport-related. (J.A., p. 11a, paras. 19-21; p. 15a, para. 40; p. 17a, para. 50.) It is abundantly clear that this reservation of the terminal facilities at LAX for their intended purposes is constitutionally permissible.

The fact that communication occurs within a facility, by itself, does not open the facility as a public forum. Likewise, the fact that the general public is freely admitted to the facilities or that some people have conducted protected activi-

ties within those facilities does not establish the opening of a public forum. *Perry Ed. Assn. v. Perry Local, supra,* at pp. 47-48; *Greer v. Spock, supra,* at p. 838, n. 10.

Regardless, Respondents argue that the interiors of the airport terminal facilities at LAX have been opened as public forums because communication takes place within those terminals.[6] The fact that communication occurs or has not been prohibited by Petitioners does not indicate any intent to open the terminal facilities to non-airport related activities. These activities are merely examples of activities that take place in all public or private buildings. Petitioners, in limiting the uses of the buildings under their control to their intended and dedicated purposes, have not attempted to interpret people's thoughts, to limit people's conversations to airport-related subjects or to discern a person's intent when he or she wears particular types of clothing. Rather, Petitioners have sought to limit the activities authorized to only those that directly aid the traveling public and to prohibit other clearly non-airport related activities. (J.A., p. 11a, paras, 19-21; p. 15a, paras. 40-43; p. 17a, paras. 50-54.) Thus, Petitioners restrict people, like Respondents, from conducting activities that are clearly non-airport related while still allowing the traveling public to pass the time by engaging in conversations or reading the paper.

---

[6]Respondents state that some people enter the terminals wearing clothing imprinted with slogans that attempt to make a "statement," that people also use telephones and read newspapers while in the terminal facilities, and that newspapers and books are sold within the terminals. Each of these activities, in one context or another, has been held to be an activity protected by the First Amendment. To cite the occurrence of these activities, however, as evidence that the interiors of the terminal facilities have been "opened" as public forums is ludicrous. The fact that these types of activities occur does not transform the interiors of any government-owned buildings, including the terminal facilities at LAX, into either traditional or opened public forums.

IV.

PETITIONERS' PRACTICE OF LIMITING THE USES OF THE INTERIORS OF THE TERMINAL FACILITIES AT LAX TO AIRPORT-RELATED PURPOSES ONLY IS A REASONABLE WAY TO OPERATE THE AIRPORT.

If, as Respondents argue, the interiors of the terminal facilities at LAX are public forums, then each decision or policy regarding the uses of those facilities must pass a strict scrutiny test establishing each time that a decision denying access serves a compelling state interest and is the least restrictive means available to serve the government's interest in operating its facilities for their intended, non-communicative purposes.

Since the interiors of the airport terminal facilities at LAX are not public forums, the appropriate test to apply when examining Petitioners' policy limiting the uses of the interiors of those facilities is whether or not that policy is reasonable. *Perry Ed. Assn. v. Perry Local Ed. Assn., supra,* at p. 46. The test is not, as Respondents argue, whether the policy is the least restrictive one, whether airport officials can exercise some discretion or whether Respondents' particular activities would not be disruptive of the purpose of the building. Rather, the standard to be applied is clearly set forth in *Cornelius*, wherein this Court stated:

> "The Government's decision to restrict access to a nonpublic forum need only be reasonable; it need not be the *most* reasonable or the *only* reasonable limitation. In contrast to a public forum, a finding of strict incompatibility between the nature of the speech or the identity of the speaker and the functioning of the nonpublic forum is not mandated." *Cornelius v. N.A.A.C.P., supra,* at p. 5121, L.Ed.2d 584. (Emphasis added.)

This reasonableness standard, applicable when a government limits the uses of its facilities to their intended purposes, gives the government the necessary latitude in making decisions about the operation of its facilities for their intended

and dedicated purposes. *U. S. Postal Service v. Greenburgh Civic Assn., supra*, at p. 133. The mere fact that a facility can be used for unrelated, expressive activities does not require that it must be made available for those unrelated activities. *City Council v. Taxpayers for Vincent, supra*, at p. 814. The fact that the public is freely admitted to a facility does not require that it be opened to expressive activities. *City Council v. Taxpayers for Vincent, supra*, at p. 814; *U. S. v. Grace, supra*, at p. 77.

Likewise, even if Petitioners were found to have granted some access for expressive purposes because they have permitted airport-related activities that might be expressive in nature, this "selective access does not transform government property into a public forum." *Perry Ed. Assn. v. Perry Local Ed. Assn., supra*, at p. 47. As in *Perry* "[t]here is no court finding or evidence in the record which demonstrates that this permission has been granted as a matter of course to all who seek to distribute material." *Perry Ed. Assn. v. Perry Local Ed. Assn., supra*, at p. 47. There is no finding or evidence in the record that any person or group has been granted permission by Petitioners to do that which Respondents wish to do.[7]

In this regard, it is submitted that Petitioners' policy limiting the uses of the terminal facilities to their intended purposes is far more reasonable than the policy upheld by this Court in *Perry, supra*. In *Perry*, a variety of public service groups who were generally disassociated from the school had, in fact, used the claimed public forum. In this case, there is no

---

[7]A large number of groups and individuals have sought permission to use the interiors of the terminal facilities at LAX to achieve their non-airport related objectives. The reasonableness of and justification for the Petitioners' policy must be analyzed with the recognition that the Airport's functions would be seriously disrupted by the activities of all the groups who wish to use the terminal facilities to expound their views on a myriad of subjects. *Heffron v. ISKCON, supra*, at pp. 653-654; *City Council v. Taxpayers for Vincent, supra*, at p. 793, *Clark v. Community for Creative Non-Violence*, 52 U.S.L.W. 4987, 4988, 468 U.S. _____, 82 L.Ed.2d 221, 229, 104 S.Ct. _____ (1984).

such situation. The authorized uses of the Airport have always been limited to airport-related purposes and the pursuit of other purposes by other groups has been prohibited.

Thus, it is submitted that limiting the uses of the terminal facilities at LAX to those that directly aid the traveling public is eminently reasonable and is not an attempt to suppress Respondents' or anyone else's views but is, rather, an exercise of Petitioners' right to limit the uses of the terminal facilities at LAX to their dedicated and intended purposes.

If, as Petitioners contend, and this Court's cases support, the interiors of the airport terminal facilities at LAX are not traditional public forums dedicated to unrestrained speech and expression, then Petitioners had the option to limit the uses of their facilities to their intended purposes only and to make the necessary decisions to achieve that goal or to open their facilities as public forums and to make decisions according to the rules applicable when controlling a public forum. *Cornelius v. N.A.A.C.P., supra*, at p. 5121, L.Ed.2d 584. Electing to reserve their facilities to their intended purposes is a reasonable way to operate airport facilities that are held in trust and required to be used for airport-related purposes only.

V.

PETITIONERS' POLICY AND PRACTICE OF LIMITING THE USES OF THE INTERIORS OF THE TERMINAL FACILITIES AT LAX TO AIRPORT-RELATED PURPOSES ONLY DOES NOT RESULT IN IMPERMISSIBLE DISCRETION OR CONTENT OR RELIGIOUS DISCRIMINATION.

In *Perry Ed. Assn. v. Perry Local Ed. Assn., supra,* this Court explained that:

> "... Implicit in the concept of the nonpublic forum is the right to make distinctions in access on the basis of subject matter and speaker identification. These distinctions may

> be impermissible in a public forum but *are inherent and inescapable in the process of limiting a nonpublic forum* to activities compatible with the intended purpose of the property. The touchstone for evaluating these distinctions is whether they are reasonable in light of the purpose which the forum at issue serves." *Perry Ed. Assn. v. Perry Local Ed. Assn., supra,* at p. 49. (Fn. omitted. Emphasis added.)

In order to reserve its property to its "official business," a government entity must have the ability to determine what its official business is, to determine what activities further that business, and to reasonably make decisions about whom may participate in that official business.

Respondents have argued that Petitioners' policy limiting the uses of the terminal facilities to airport-related purposes only, is content-based and/or religious discrimination,[8] operates as a prior restraint and grants too much discretion to Petitioners. Respondents' arguments ignore the nature of a nonpublic forum and, if followed, would prevent any and all government entities from preserving their property for their lawfully dedicated purposes.

Petitioners, acting pursuant to the mandate of the Los Angeles City Charter, consistently have limited the uses of the Central Terminal Area (hereinafter "CTA") of LAX to those activities that directly aid the traveling public. (J.A., pp. 9a-11, paras. 16, 17, 19, 20 and 21.) Non-airport related commercial activities are not permitted anywhere within the CTA while non-airport related activities protected by the First

---

[8]Respondents repeatedly cite the Christian Science Reading Room to take advantage of the word "Christian" in the lessee's name. (Resp. Br., pp. 3, 5, 7, 8, 9, 11, 31, 32, 40, 44, 46.) This attempt, however, completely ignores that the Reading Room is a leased area that provides a waiting room for the traveling public. The critical issue is not the name of the entity that leases the space but, rather, whether the purpose for which the area is used is airport-related. It is abundantly clear that providing a waiting room for use by the traveling public is airport-related.

Amendment are not permitted within the interiors of the terminal facilities but can take place on the sidewalk areas immediately adjacent to those facilities. It is important to note that Petitioners are *regulating activities* on the property under their control. They have not directed their prohibition only to expressive activities but, rather, distinguish between airport and non-airport related "activities." Thus, Petitioners have limited the uses of the interiors of the terminal facilities at LAX to only those activities that directly aid or are necessary to the traveling public and have prohibited all others. (J.A., p. 11a, para. 19; p. 17a, para. 51.) They have limited the activities within the terminal facilities at LAX to the "official business" of the airport.

Some of the airport-related activities permitted by Petitioners involve communication among people, the imparting of information by people in the terminals to other people there, and other activities that have been held, in one context or another, to be activities protected by the First Amendment. The fact that these activities occur and that Respondents' unrelated religious activities are disallowed does not make the facility a public forum; nor is it evidence that there is impermissible content-based discrimination, prior restraint, or viewpoint discrimination being exercised by Petitioners against Respondents' particular views.

This Court has recognized that distinctions in access based on subject matter and speaker identification are "inherent and inescapable" in limiting a nonpublic forum to its intended activities. *Perry Ed. Assn. v. Perry Local Ed. Assn., supra,* at p. 49. Such a right to ". . . draw distinctions which relate to the special purpose for which property is used. . .," *Perry Ed. Assn. v. Perry Local Ed. Assn., supra,* at p. 55, is necessary if a government is going to be able to reserve its facilities for their intended purposes.

Regardless of this, Respondents claim a right to use the interiors of the terminal facilities at LAX for their own religious, non-airport related purposes. They claim that an airport operator must make the interiors of its airport termi-

nal facilities available for activities other than those for which the facilities were intended or to which they are dedicated.

As has been shown, Petitioners have legitimately limited the facilities under their control to their lawfully dedicated purposes because the interiors of the airport terminal facilities at LAX are nonpublic forums. Because the facilities are nonpublic forums, Petitioners can "without further justification — restrict use to those who participate in the forum's official business." *Perry Ed. Assn. v. Perry Local Ed. Assn., supra,* at p. 52. (Fn. omitted.)

Petitioners' policy and practice of limiting the uses of the interiors of those facilities to airport-related purposes only and disallowing all others, including Respondents' religious activities, is clearly not a decision based on Petitioners' opinion of Respondents' particular views. There is no hint or claim of covert censorship in the adoption or application of Petitioners' policy. Rather, Petitioners' policy is one that is used to limit the uses of the Airport to its intended purposes only and to allow only those activities within the Airport that will directly aid the traveling public. Such a policy is both reasonable and constitutional.

VI.

PETITIONERS ARE NOT CONSTITUTIONALLY REQUIRED TO USE THE INTERIORS OF THE AIRPORT TERMINAL FACILITIES AT LAX AS PUBLIC FORUMS BUT, RATHER, CAN RESERVE THOSE FACILITIES FOR THEIR INTENDED AIRPORT-RELATED PURPOSES ONLY.

This Court has stated repeatedly that a government entity "has the power to preserve the property under its control for the use to which it is lawfully dedicated." *Greer v. Spock, supra,* at p. 846; *U. S. Postal Service v. Greenburgh Civil Assn., supra,* at p. 129.

Furthermore, a government is not required to open all of its facilities for unrelated public exprssion but rather may ban the entry onto public property ". . . of all persons except those who have legitimate business on the premises." *U. S. v. Grace, supra,* at p. 178.

Petitioners have done nothing more than what this Court has said is constitutionally permissible. They have exercised their right to reserve their property for its intended purposes and to draw the necessary distinctions that relate to the special purposes for which their property is used. *Perry Ed. Assn. v. Perry Local Ed. Assn., supra,* at p. 55. Petitioners have allowed only those activities to take place that directly aid the traveling public. (J.A., p. 11a, paras. 19-21; p. 17a, para. 51.) Clearly, Respondents' religious activities do not fall within that airport-related category and, because those activities are not part of the official business of the Airport, their and all other non-airport related activities constitutionally may be prohibited.

CONCLUSION

Based on the foregoing, Petitioners respectfully request that this Court reverse the judgment of the United States Court of Appeals for the Ninth Circuit and hold that the interiors of the terminal facilities at Los Angeles International Airport are not public forums and that Petitioners' policy restricting the use of those facilities to airport-related purposes only is constitutionally permissible.

Respectfully submitted,

JAMES K. HAHN,
City Attorney
JAMES H. PEARSON,
Senior Assistant City Attorney
JAMES R. KAPEL,
Assistant City Attorney

Attorneys for Petitioners

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

On February 23, 1987, I served the within Petitioners' Reply Brief in re: "The Board of Airport Commissioners vs. Jews for Jesus, Inc." in the United States Supreme Court October Term 1985, No. 86-104;

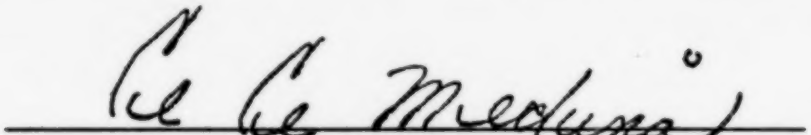
on the Parties in said action, by placing three copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

Andrew Ekonomau
515 Rhodes Haverty Building
134 Peachtree Street N.W.
Atlanta, Georgia 30303
(Hand Delivered)

All Parties required to be served have been served.

I certify (or declare), under penalty of perjury, that the foregoing is true and correct.

Executed on February 23, 1987, at Los Angeles, California.



CE CE MEDINA

No. 86-104 (4)

Supreme Court, U.S.
FILED
NOV 20 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

THE BOARD OF AIRPORT COMMISSIONERS OF THE CITY OF LOS ANGELES, *et al.*,

Petitioners,

v.

JEWS FOR JESUS, INC., and ALAN HOWARD SNYDER, a.k.a. AVI SNYDER,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF AIRPORT OPERATORS COUNCIL INTERNATIONAL (AOCI) AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS, THE BOARD OF AIRPORT COMMISSIONERS OF THE CITY OF LOS ANGELES, *et al.*

ARTHUR P. BERG
Attorney for *Amicus Curiae*
AIRPORT OPERATORS COUNCIL INTERNATIONAL (AOCI)
One World Trade Center
Suite 66E
New York, New York 10048
(212) 466-8794

On the Brief:
Arthur P. Berg
Anne M. Tannenbaum
Arnold D. Kolikoff

25 pgs

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF THE *AMICUS CURIAE*	1
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	3
ARGUMENT	4
POINT I – AIRPORTS ARE NOT TRADITIONAL PUBLIC FORA BY REASON OF THEIR HISTORY, PURPOSE AND CHARACTER	4
POINT II – LOS ANGELES INTERNATIONAL AIRPORT'S CENTRAL TERMINAL AREA IS NOT A DESIGNATED PUBLIC FORUM BECAUSE IT HAS NOT BEEN OPENED FOR FIRST AMENDMENT USE BY THE PUBLIC AT LARGE	15
POINT III – PROHIBITION OF RESPONDENTS' DISTRIBUTION OF LEAFLETS AT LOS ANGELES INTERNATIONAL AIRPORT'S CENTRAL TERMINAL AREA IS A PERMISSIBLE REGULATION OF FIRST AMENDMENT ACTIVITY IN A NON-PUBLIC FORUM	17
CONCLUSION	19

TABLE OF AUTHORITIES

Cases	Page
Adderley v. Florida, 385 U.S. 39 (1966)	6
Chicago Area Military Project v. City of Chicago, 508 F.2d 921 (7th Cir. 1975), *cert. denied*, 421 U.S. 992 (1975)	5n.
Consolidated Edison Company of New York, Inc. v. Public Service Comm'n, 477 U.S. 530 (1980)	11
Cornelius v. NAACP Legal Defense & Educational Fund, Inc., ____ U.S. ____ , 105 S.Ct. 3439 (1985)	*passim*
Fernandes v. Limmer, 663 F.2d 619 (5th Cir. 1981), *cert. dismissed*, 458 U.S. 1124 (1982)	5n.
Flower v. United States, 407 U.S. 197 (1972)	10
Greer v. Spock, 424 U.S. 828 (1976)	2, 6, 10, 15
Hague v. C.I.O., 307 U.S. 496 (1939)	7, 9
International Society for Krishna Consciousness, Inc. v. Rochford, 585 F.2d 263 (7th Cir. 1978)	5n.
International Society for Krishna Consciousness of Atlanta v. Eaves, 601 F.2d 809 (5th Cir. 1979)	5n.
Kuszynski v. City of Oakland, 479 F.2d 1130 (9th Cir. 1973)	5n.
Lehman v. City of Shaker Heights, 418 U.S. 298 (1974)	11, 14

	Page
Marsh v. Alabama, 326 U.S. 501 (1946)	9
Members of the City Council v. Taxpayers for Vincent, 466 U.S. 789 (1984)	6, 7
Perry Education Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983)	*passim*
Rosen v. Port of Portland, 641 F.2d 1243 (9th Cir. 1981)	5n.
United States v. Albertini, ____ U.S. ____ , 105 S.Ct. 2897 (1985)	6, 10
United States v. Grace, 461 U.S. 171 (1983)	6, 7, 10
United States Postal Service v. Greenburgh Civic Ass'ns, 453 U.S. 114 (1981)	14
U.S. Southwest Africa/Namibia Trade & Cultural Council v. United States, 708 F.2d 760 (D.C. Cir. 1983)	5n.
Widmar v. Vincent, 454 U.S. 263 (1981)	7n.
Statutes:	
Airport and Airway Improvement Act of 1982, §§507, 511(a)(9), 49 U.S.C. app. §§2207, 2210(a)(9) (1982)	9

	Page
Air Transportation Security Act of 1974, §202, as amended, 49 U.S.C. §§1356, 1357 (1982 & Supp. III 1985)	13
Internal Revenue Code of 1954, §§4261-62, 4271-72, as amended, 26 U.S.C. §§4261-62, 4271-72 (1982 & Supp. III. 1985)	8
Tax Equity and Fiscal Responsibility Act of 1982, §281(a), as amended, 26 U.S.C. §§9502(b), 9502(c) (1982 & Supp. III 1985)	9
Regulations:	
14 C.F.R., Parts 107,108, 109 (1986)	13
14 C.F.R. §§107.23(b)(3), 108.19(a), 109.3(a)(1) (1986)	13
Other Authorities:	
Congress, Office of Technology Assessment, Airport System Development (1984)	12
Congressional Budget Office, Financing U.S. Airports in the 1980's (1984)	12
Department of Transportation, National Plan of Integrated Airport Systems 1984-1993 (1985)	8
W. Hart, The Airport Passenger Terminal (1985)	12
R. Horonjeff & F.X. McKelvey, Planning & Design of Airports (3d. ed. 1983)	8
Lemer, *Airport Landside Capacity: A Growing Concern*, T.R. News, May-June 1986	12, 14

No. 86-104

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

THE BOARD OF AIRPORT COMMISSIONERS OF THE CITY OF LOS ANGELES, *et al.*,

Petitioners,

v.

JEWS FOR JESUS, INC., and ALAN HOWARD SNYDER, a.k.a. AVI SNYDER,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF AIRPORT OPERATORS COUNCIL INTERNATIONAL(AOCI) AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS, THE BOARD OF AIRPORT COMMISSIONERS OF THE CITY OF LOS ANGELES, *et al.*

INTEREST OF THE *AMICUS CURIAE*

This brief *amicus curiae* is being filed pursuant to United States Supreme Court Rule 36 on behalf of the members of the Airport Operators Council International (AOCI). AOCI is a cooperative, non-profit association of 228 government bodies that own and

operate over 850 airports throughout the world including virtually all major domestic airports. More than 90% of the nation's domestic scheduled air passenger and cargo traffic, and virtually all of the nation's scheduled international traffic, are enplaned at AOCI member airports in the United States. AOCI provides its members with information and assistance through its conferences and literature, represents the collective interest of its members before a variety of government and air carrier industry organizations, and serves as the voice of its members to the media and the public.

AOCI is filing this *amicus* brief because of its concern that, if affirmed, the decision below holding the Central Terminal Area building of Los Angeles International Airport to be a traditional public forum would mean that all airports would be required to be available for solicitation, leafletting and other expressive activity.

This Court held in *Cornelius v. NAACP Legal Defense & Educational Fund, Inc.*, ____ U.S. ____, 105 S. Ct. 3439 (1985), *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983), and *Greer v. Spock*, 424 U.S. 828 (1976), that government property which has not traditionally served as a place for, and which does not have as a principal purpose, the expression of ideas may be preserved for the purposes for which it is intended and need not be treated as a public forum.

This brief will establish that airports, no less than the government facilities involved in the above cases, have not traditionally served as places for, and do not have as a principal purpose, the expression of ideas and therefore may be preserved for the air transportation purpose for which they were intended. Accordingly, the decision below holding that the Central Terminal Area building of Los Angeles International Airport is a traditional public forum should be reversed.

STATEMENT OF THE CASE

The Statement Of The Case contained in Petitioners' Brief is adopted by AOCI for purposes of this *Amicus Curiae* Brief.

SUMMARY OF ARGUMENT

The power of government to regulate First Amendment activity in both traditional public fora and designated public fora is severely circumscribed. Such regulations are constitutional only if they are necessary to serve a compelling government interest. However, in a non-public forum, a government's power to regulate First Amendment activity is much broader and expressive activity may be reasonably regulated in the interest of preserving the non-public forum for the purposes for which it was intended.

The Ninth Circuit erred in holding airports to be traditional public fora based on the facts that airports are generally open to the public and have large numbers of visitors. This Court has made it clear that these factors alone do not establish a traditional public forum.

Airports fall into the category of non-public fora. In recent years, this Court has made it clear that traditional public fora are only those places which have traditionally been devoted to assembly and debate, and which have as a principal purpose serving as a site for expressive activity. *Cornelius v. NAACP Legal Defense & Educational Fund, Inc.*,__ U.S.__, 105 S.Ct. 3439 (1985); *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983). Airports, like other non-public fora, neither have a long tradition of being used as sites for assembly and debate, nor have they been created to serve as sites for expressive activity. Indeed, airports have a single purpose -- facilitating safe, efficient and convenient air travel.

That single purpose causes airports to have other critical differences from traditional public fora which reflect their non-public forum status. Unlike traditional public fora, airports are not integrated into their neighboring communities but rather serve as portals to those communities. Also, airport patrons, unlike users of traditional public fora, are a captive audience to expressive activity being conducted in the areas where they must remain to serve their air travel needs. Furthermore, airports suffer from special congestion problems which do not exist in traditional public fora. Finally, airports present special security problems, not found in traditional

public fora, which necessitate security precautions taken at few other public facilities in our society.

It is also clear that classification of Los Angeles International Airport's (LAX's) Central Terminal Area building (CTA) as a designated public forum would be contrary to the decisions of this Court. A designated public forum only can be created if the relevant government authority intends to open the site to First Amendment activity by the public at large. However, LAX's explicit prohibition of First Amendment activities at the CTA precludes any inference of such intent. Moreover, even if First Amendment activity is permitted at any particular airport, that, in and of itself, would not support a conclusion that the airport's proprietor intended to create a designated public forum, since any such permission would have been granted in response to erroneous circuit court precedent.

Finally, LAX's prohibition against distributing literature on the CTA concourse floor fully satisfies the First Amendment requirements for the regulation of expressive activity in a non-public forum. The regulation is viewpoint-neutral and is reasonably related to preserving LAX for the purpose for which it was intended – facilitating air transportation.

ARGUMENT

POINT I

AIRPORTS ARE NOT TRADITIONAL PUBLIC FORA BY REASON OF THEIR HISTORY, PURPOSE AND CHARACTER

Three years ago, in *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983), this Court set forth a comprehensive analytical model for determining whether, and to what degree, a government is required by the First Amendment to permit expressive activity in a publicly-owned facility. That model properly differentiated between a traditional public forum, a designated public forum, and a non-public forum which is created for purposes other than expressive activity on the part of the public at large.

Under the *Perry* model, which was applied by this Court most recently in *Cornelius v. NAACP Legal Defense & Educational Fund, Inc.*, ___ U.S. ___ , 105 S.Ct. 3439 (1985), a government may not constitutionally prohibit First Amendment activity from a traditional public forum or a designated public forum unless the prohibition is necessary to serve a compelling government interest.[1] In sharp contrast, in a non-public forum reasonable regulations that preserve the forum for its "intended purposes" are fully constitutional, as long as there is no viewpoint discrimination. *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S., at 46.

In the instant case, the Ninth Circuit erroneously held that airports are traditional public fora because it mistakenly based public forum status on the fact that airports are generally open to the public and the fact that large numbers of people are frequently on the premises.[2] This Court, however, has made it clear in numerous

---

[1] In a traditional public forum, only time, place and manner regulations narrowly tailored to serve a significant government interest may be enforced. Moreover, such regulations must leave open ample alternative channels of communication. *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S., at 45.

[2] For example, *Kuszynski v. City of Oakland*, 479 F.2d 1130 (9th Cir. 1973), held that Oakland's airport was a public forum merely because it was public property, *id.*, at 1131, using "public" to refer to government ownership or unrestricted access. Similarly, in *U.S. Southwest Africa/Namibia Trade & Cultural Council v. United States*, 708 F.2d 760 (D.C. Cir. 1983), *Fernandes v. Limmer*, 663 F.2d 619 (5th Cir. 1981), *cert. dismissed*, 458 U.S. 1124 (1982), and *Chicago Area Military Project v. City of Chicago*, 508 F.2d 921 (7th Cir. 1975), *cert. denied*, 421 U.S. 992 (1975), the respective circuits held that the airports in question were public fora because the public had unrestricted access to the airports and because large numbers of people used the airports. *See, U.S. Southwest Africa/Namibia Trade & Cultural Council v. United States*, 708 F.2d, at 764; *Fernandes v. Limmer*, 663 F.2d, at 607; *Chicago Area Military Project v. City of Chicago*, 508 F.2d, at 925.

Other circuit court decisions holding airports to be public fora merely rely on the circuit's prior decision so holding. *See, Rosen v. Port of Portland*, 641 F.2d 1243, 1246 (9th Cir. 1981); *International Society for Krishna Consciousness, Inc. v. Rochford*, 585 F.2d 263, 267 (7th Cir. 1978).

Another circuit court decision treated an airport as a public forum without describing it as such or explaining why that classification was appropriate. *International Society for Krishna Consciousness of Atlanta v. Eaves*, 601 F.2d 809 (5th Cir. 1979).

cases that such facts do not establish public forum status. More specifically, this Court has

> " . . . expressly rejected the suggestion that 'whenever members of the public are permitted freely to visit a place owned or operated by the Government, then that place becomes a "public forum" for purposes of the First Amendment.' "

United States v. Albertini, ____ U.S. ____ , 105 S.Ct. 2897, 2905 (1985), *quoting Greer v. Spock*, 424 U.S., at 836; *see also, United States v. Grace*, 461 U.S. 171, 177 (1983).

Similarly, in *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789 (1984), this Court rejected in equally unequivocal terms the proposition that a publicly-owned facility is a public forum because it would be a useful place for the communication of ideas:

> "Lampposts can of course be used as signposts, but the mere fact that government property can be used as a vehicle for communication does not mean that the Constitution requires such uses to be permitted. *Cf. United States Postal Service v. Greenburgh Civic Assns.*, 453 US, at 131."

Id., at 814 (footnote omitted); *see also, United States v. Albertini*, 105 S.Ct., at 2905; *Greer v. Spock*, 424 U.S., at 838 n. 10.

The basis for excluding expressive activity from government-owned property otherwise generally open to the public is, as held by this Court, that:

> "The State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated."

Adderley v. Florida, 385 U.S. 39, 47 (1966).

As held by this Court, "a principal purpose of traditional public fora is the free exchange of ideas . . . ." *Cornelius v. NAACP*

Defense & Educational Fund, Inc., 105 S.Ct., at 3448. Thus, a government-owned facility is a traditional public forum *only* if it is among "those places which 'by long tradition or by government fiat have been devoted to assembly and debate.' " *Id.*, at 3449, *quoting Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S., at 45. This description hearkens back to the often-quoted passage by Justice Roberts in *Hague v. C.I.O.*, 307 U.S. 496, 515 (1939):

> "Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens."

As the quotation from *Hague* suggests, public streets and parks are a unique species of public property. The special character of streets and parks is reflected in the fact that this Court has never specifically identified as a traditional public forum anything other than a street, sidewalk, or park.[3] *See, Cornelius v. NAACP Legal Defense & Educational Fund, Inc.*, 105 S. Ct., at 3449; *Members of the City Council v. Taxpayers for Vincent*, 466 U.S., at 792-93; *United States v. Grace*, 461 U.S., at 177; *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S., at 45.

Significantly, airports, unlike streets and parks, do not have a tradition of being used as sites for assembly and debate. Moreover, in sharp contrast to streets and parks which have the exchange

---

[3] A college campus has been described as possessing "many of the characteristics of a traditional public forum" for its students. *Cornelius v. NAACP Legal Defense & Educational Fund*, 105 S.Ct., at 3450, *citing Widmar v. Vincent*, 454 U.S. 263, 267 n.5 (1981). *Widmar* described a college campus as having the characteristics of a public forum because the campus serves as a "marketplace of ideas." 454 U.S., at 267 n.5. However, the same cannot be said of an airport, the purpose of which is transportation, not discourse.

of ideas as a principal purpose, airports have only one purpose, *i.e.*, to effect the safe, efficient and convenient movement of departing and arriving passengers to and from aircraft. All airport functions and services are either directly or indirectly related to air travel.[4] *See*, R. Horonjeff & F.X. McKelvey, Planning & Design of Airports, at 325-27 (3d ed. 1983) [Lodg 3-5].[5]

The sole purpose of airports, the facilitation of air travel, is reflected in all aspects of airport operations, such as their financing, their lack of integration with neighboring communities, the creation of captive audiences, and the special congestion and security problems which are not present in traditional public fora.

Streets and parks are financed from general tax funds. In contrast, reflecting their limited purpose, airports are financed to the greatest extent possible from user fees paid by the airlines, air passengers and general aviation. In a 1985 report to Congress, the Secretary of Transportation observed that virtually all airport funding comes from airport-user sources. Department of Transportation, National Plan of Integrated Airport Systems 1984-1993, at 16 (1985) [Lodg 11].

Even the limited portion of airport capital funding provided by the Federal Government does not come from general revenues. Rather, federal aid to airports is derived from user fees collected from air passengers via an airline ticket excise tax, Internal Revenue Code of 1954, §§4261-62, as amended, 26 U.S.C. §§4261-62 (1982 & Supp. III 1985), and from transporters of property by air via an airwaybill excise tax. *Id.*, §§4271-72, 26 U.S.C. §§4271-72 (1982). These user fees are accumulated in a trust fund together with an amount of taxes equivalent to those received as excise taxes on aircraft tires and aircraft fuel, Tax Equity and

---

[4] Indirect aids to air travel at airports include refreshment stands, restaurants and retail shops, which are provided for the comfort and convenience of air travelers.

[5] "Lodg" followed by numerals refers to pages in the Lodging of the *Amicus Curiae*. The Lodging, which has been deposited with the Court, contains copies of material other than statutes, regulations and judicial opinions referred to herein.

Fiscal Responsibility Act of 1982, §281(a), as amended, 26 U.S.C. §9502(b) (1982 & Supp. III 1985), plus such additional monies as are necessary to defray the expense of maintaining the federal components of the national air traffic system. *Id.*, §281(a), 26 U.S.C. §9502(c) (1982). Trust fund monies are disbursed as federal grants to airport operators for the construction of airport additions and improvements. The primary criterion guiding the distribution of federal aid is the number of passengers enplaned at each airport. Airport and Airway Improvement Act of 1982, §507, 49 U.S.C. app. §2207 (1982). Significantly, an explicit statutory requirement for the receipt of federal aid is that an airport be self-supporting to the extent possible. Airport and Airway Improvement Act of 1982, §511(a)(9), 49 U.S.C. app. §2210(a)(9) (1982).

LAX is typical of most major airports in the United States in that it is, in fact, financially self-supporting. At such airports, operating costs must be satisfied with revenues generated from travel related user fees. *See*, Joint Appendix, at 15a-16a, ¶¶44-45. As indicated by their financing, including the Federal Aid statutes, it is clear that the sole purpose of airports is the facilitation of air transportation.

An essential feature of a traditional public forum, totally absent in an airport because of its limited purpose, is that a public forum is integrated into the community. Streets and parks, "time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions", *Hague v. C.I.O.*, 307 U.S., at 515, because those sites are integral to daily life in their communities. Thus, in *Marsh v. Alabama*, 326 U.S. 501 (1946), this Court held that, notwithstanding private ownership, First Amendment activity could not be prohibited in the "business block" of a "company town", since,

> "The 'business block' serves as the community shopping center and is freely accessible and open to the people in the area and those passing through."

Id., at 508.

The importance of integration into the surrounding community to the existence of a traditional public forum is demonstrated by the

disparate treatment accorded to the two military bases involved in *Flower v. United States*, 407 U.S. 197 (1972), and *Greer v. Spock*, 424 U.S. 828 (1976). Although both bases were completely open to the public, in *Flower* this Court held that a military commander could not bar leafletting on a street in Fort Sam Houston, Texas, whereas in *Greer* this Court upheld the exclusion of leafletting from the Fort Dix Military Reservation in New Jersey. *See also, United States v. Albertini*, __ U.S. __, 105 S.Ct. 2897 (1985). Fort Dix was held by this Court to merit different treatment from that of Fort Sam Houston because the streets of Fort Sam Houston were integrated into the surrounding city of San Antonio, whereas Fort Dix was not integrated into any surrounding community, and thereby retained its character as a separate military enclave. *Greer v. Spock*, 424 U.S., at 835-36. Consequently, Fort Dix's commanding officers were held not to have "abandoned" their "claim of special interest in regulating the distribution of unauthorized leaflets . . . within the confines of the military reservation." *Id.*, at 837.

United States v. Grace, 461 U.S. 171 (1983), is also in point on this issue. There, this Court held that the statute prohibiting, among other things, distributing leaflets and displaying banners on Supreme Court grounds was unconstitutional insofar as it applied to the sidewalks on the perimeter of those grounds. Significantly, this Court observed in *Grace* that neither the public ownership of those sidewalks, nor the lack of restrictions to entry on them, required that the sidewalks be treated as a public forum. *Id.*, at 178. However, in holding that the statute was invalid with respect to the sidewalks surrounding the Supreme Court, this Court emphasized that such sidewalks were indistinguishable from other Washington, D.C. sidewalks. More specifically, this Court stated that,

> "There is no separation, no fence, and no indication whatever to persons stepping from the street to the curb and sidewalks that serve as the perimeter of the Court grounds that they have entered some special type of enclave."

Id., at 180.

Here, as in the case of Fort Dix, and unlike the facts in *Flower* and *Grace*, it is clear that airports are not integrated into the day-to-day life of surrounding communities. The singular purpose of an airport, air transportation, delimits the role it serves in relation to its neighboring communities to that of a portal to those communities. The people living near an airport do not enter it as they go about their daily life, but enter only to leave their locale or to drop off or pickup an air passenger. Therefore, airport officials, no less than the military officials at Fort Dix, have not "abandoned" their "claim of special interest in regulating the distribution of unauthorized leaflets . . . within the confines of the [airport]."

Additionally, and in sharp contrast to the traditional public fora of streets and parks, the singular purpose of airports creates captive audiences. Airports are used by the public to board and leave airplanes at scheduled departing and arrival times, or to meet and see off air passengers. Persons waiting for an airplane to arrive or depart shortly are not free to roam the airport. Rather, they must remain in a waiting area or risk missing the airplane. Thus, persons using the waiting areas constitute a captive audience for anyone expressing his or her views within their visual or aural range. Captive audiences exist not only at the enplaning and deplaning points, but also at ticket counters, security checkpoints, baggage conveyor belts, and car rental and other ground transportation counters. The public must remain at all of these locations to complete travel-related tasks.

Quite obviously, as noted by Justice Douglas with regard to the patrons of public transportation vehicles, the rights of such captive audiences "to be free from forced intrusions on their privacy" would be violated if they were forced to be the object of uninvited persuasion. *Lehman v. City of Shaker Heights*, 418 U.S. 298, 307 (1974) (Douglas, J., concurring); *cf., Consolidated Edison Company of New York, Inc. v. Public Service Comm'n*, 447 U.S. 530, 542 (1980).

The singular purpose of facilitating air transportation is also reflected in the unique pedestrian congestion problems of airports. Initially, it should be noted that at an airport, unlike the usual

situation in a street or a park, a pedestrian delay of minutes or even seconds could very well cause a loss of hours in travel time because of a missed plane. Secondly, at an airport, unlike a street or a park, there is little or no choice among alternative pedestrian routes. Those using an airport to board a departing airplane move from the airport entrance to the terminal building, and then from ticketing counter to security checkpoint to gate check-in counter to enplaning waiting area to airplane boarding ramp. *See*, W. Hart, The Airport Passenger Terminal, at 17-18 (1985) [Lodg 15-16]. Similarly, arriving passengers move from the deplaning ramp to the baggage pick-up area to ground transportation facilities. *Id.*, at 18 [Lodg 16].

It also is well-established that at major airports, pedestrian routes are heavily congested during peak travel hours. Lemer, *Airport Landside Capacity: A Growing Concern*, T.R. News, May-June 1986, at 5 [Lodg 31]. The timing and duration of peak periods are subject to considerable fluctuation. Problems of congestion often are multiplied and lengthened by delays resulting from local weather conditions, mechanical difficulties, airline "hubbing" activities, and other causes. In addition, charter flight activity and schedule changes caused by weather conditions and other factors throughout the United States and the world also cause considerable variation in the intensity of use of each airport. *See generally*, Congress, Office of Technology Assessment, Airport System Development, at 48-49 (1984) [Lodg 39-40]. Thus, airport congestion varies substantially, and in a manner that cannot be accurately predicted.

Moreover, congestion at major airports is getting worse. In the words of the Congressional Budget Office,

> "Crowding has thus emerged as the major airports' number-one problem, and the FAA anticipates a worsening of airport congestion in coming years."

Congressional Budget Office, Financing U.S. Airports in the 1980's, at xix (1984) [Lodg 48]. A senior research advisor of the Transportation Research Board has observed that "[s]ome airports are exceeding capacity almost on a daily basis." Lemer, *Airport Landside Capacity: A Growing Concern*, T.R. News, May-June

1986, at 2 [Lodg 28]. And the Federal Aviation Administration has estimated that the annual number of passengers using the nation's airports will increase more than 70% over the next decade, which will result in the nation's airports being "swamped". *Id.*, at 3.

LAX itself provides a good example of airport congestion problems. LAX handled over 33 million passengers annually in 1983, together with an estimated equal number of "meeters and greeters." Joint Appendix, at 9a, ¶10. The growth of airport use has necessitated costly expansion construction. *Id.*, at 8a, ¶¶6-7. However, anticipated growth in usage to 40 million passengers in 1986 means that this costly expansion project merely ameliorates but does not eliminate congestion. Joint Appendix, at 2a.

Finally, the sole purpose of facilitating air transportation is reflected in the heightened security concerns of airports which are not present in streets and parks. The well-known history of skyjacking and other forms of terrorism at airports has resulted in the adoption of equally well-known security precautions. The critical nature of these airport precautions, which need to be taken at few other locations in this society, is reflected in the fact that they are mandated by federal law. The Air Transportation Security Act of 1974 required the Secretary of Transportation to issue regulations for the mandatory screening of air passengers using international, interstate, and intrastate flights. Air Transportation Security Act of 1974, §202, as amended, 49 U.S.C. app. §§1356, 1357 (1982 & Supp. III 1985). The air security regulations currently in effect impose security obligations on airport operators, 14 C.F.R., Part 107 (1986), airline operators, *id.*, Part 108, and indirect air carriers such as freight forwarders. *Id.*, Part 109. These regulations address the potential dangers of terrorist bombing and air piracy. *See*, 14 C.F.R. §§107.23(b)(3), 108.19(a), 109.3(a)(1) (1986). These very real dangers both distinguish airports from traditional public fora and mandate that airport operators in carrying out their sole purpose of facilitating air transportation not be limited in prohibiting activities unrelated to air travel such as the expressive activity involved here.

The undeniable singular purpose of facilitating air transportation and the resultant distinctions between airports and traditional

public fora clearly make airports inappropriate locations for First Amendment activity. Such activity, as has been demonstrated, is clearly inconsistent with the purpose of an airport. Indeed, if the decision below, holding the Central Terminal Area building of LAX to be a public forum were affirmed, then every airport terminal building, as well as every government parking lot, courthouse, office building and all other government facilities generally open to the public would, "immediately become Hyde Parks open to every would-be pamphleteer and politician." *Lehman v. City of Shaker Heights*, 418 U.S., at 304, *quoted in United States Postal Service v. Council of Greenburgh Civic Assn's*, 453 U.S. 114, 130 n.6 (1981), *and, Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S., at 49 n.9. Fortunately, for the future safe, efficient and orderly operation of this nation's air transportation system and other essential governmental functions, such a result is not constitutionally required.

Time and time again, in such cases as *Taxpayers for Vincent, Greenburgh Civic Ass'ns, Greer,* and *Lehman*, this Court has held that First Amendment use of those fora was incompatible with those sites because such use was not consistent with their intended purposes. *See, United States Postal Service v. Council of Greenburgh Civic Assn's*, 453 U.S., at 130 n.6. Here, no less than in the above cited cases, it is clear that the use of airport terminal buildings for First Amendment activities is incompatible with those sites because such use is not consistent with their intended purpose.

In sum, the decision below is erroneous and in direct contravention of prior decisions by this Court. Accordingly, *Amicus* respectfully submits that this Court should hold that the Central Terminal Area building of LAX is not a traditional public forum.

POINT II

LOS ANGELES INTERNATIONAL AIRPORT'S CENTRAL TERMINAL AREA IS NOT A DESIGNATED PUBLIC FORUM BECAUSE IT HAS NOT BEEN OPENED FOR FIRST AMENDMENT USE BY THE PUBLIC AT LARGE

As defined by this Court, a designated public forum is a publicly-owned facility which is not a traditional public forum, but which has intentionally been opened for First Amendment activity on the part of the public at large. *Cornelius v. NAACP Legal Defense & Educational Fund, Inc.*, 105 S.Ct., at 3449; *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S., at 45.[6]

A designated public forum only can be created if the relevant government authority so intends. Therefore, a designated public forum is not created by inaction or if there is clear evidence of contrary intent. *Cornelius v. NAACP Legal Defense & Educational Fund, Inc.*, 105 S.Ct., at 3449, 3450. Furthermore, a designated public forum is not created when a government selectively opens a forum for use by certain speakers or on certain subjects. For example, in *Cornelius*, this Court held that the opening of the Combined Federal Campaign to over 200 charities did not transform that program into a designated public forum. *Id.*, at 3450-51. Similarly, in *Perry*, this Court held that the use of the school mailboxes by school officials, the recognized teachers' union and certain civic associations, did not transform the mailboxes into a designated public forum. 460 U.S., at 47. And finally, in *Greer v. Spock*, this Court held that inviting certain civilians to speak at Fort Dix did not transform it into a public forum. 424 U.S., at 836.

Application of the foregoing principles to the instant case leads to the inescapable conclusion that the concourse of Los Angeles

---

[6] In general, the restrictions applicable to a traditional public forum are applicable to a designated public forum except that a government need not maintain the open character of a designated public forum indefinitely, but may change the status of a designated public forum. *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S., at 46.

International Airport's Central Terminal Area (CTA) is not a designated public forum.

Resolution No. 13787 of the Los Angeles Board of Airport Commissioners explicitly states that the CTA is to be used only for air commerce and uses incidental thereto, and that the CTA is not open for First Amendment activity. Joint Appendix, at 3a-4a. Pursuant to Resolution No. 13787 the Board of Airport Commissioners has acted consistently in denying requests to conduct First Amendment activities at the CTA. Joint Appendix, at 15a, ¶¶42-43.

In view of the Resolution's explicit limitation of the use of the CTA and the express prohibition against First Amendment activity, it is clear that the airport's governing authority has not intended to open the CTA for First Amendment activity by the public at large, thereby precluding a determination of designated public forum status.[7] *Cornelius v. NAACP Legal Defense & Educational Fund, Inc.*, 105 S. Ct., at 3449, 3450.

Furthermore, classification of the CTA as a designated public forum would be unwarranted even if the Board of Airport Commissioners had not adopted Resolution No. 13787. Airports have permitted First Amendment activity only in the face of erroneous circuit court precedent holding airports to be public fora. Quite obviously, under such circumstances, the existence of a present policy at any particular airport permitting First Amendment activity is more a reflection of existing erroneous precedent than it is a reflection of the intent of the airport proprietor to designate the airport as a public forum.

For the foregoing reasons, we submit that it is clear that the Central Terminal Area of LAX has not been designated as a public forum.

---

[7] It is equally clear that the unauthorized occurrence of First Amendment activity in the CTA cannot transform that site into a designated public forum. As previously noted, inaction cannot create a public forum, especially in the face of an express policy to the contrary. *Cornelius v. NAACP Legal Defense & Educational Fund, Inc.*, 105 S. Ct., at 3449, 3450.

POINT III

PROHIBITION OF RESPONDENTS' DISTRIBUTION OF LEAFLETS AT LOS ANGELES INTERNATIONAL AIRPORT'S CENTRAL TERMINAL AREA IS A PERMISSIBLE REGULATION OF FIRST AMENDMENT ACTIVITY IN A NON-PUBLIC FORUM

It is well-established that governments may prohibit or restrict First Amendment activity in a non-public forum if the restriction is both reasonable in light of the purpose of the site in question and is not designed to suppress a particular viewpoint. *Cornelius v. NAACP Legal Defense & Educational Fund, Inc.*, 105 S.Ct., at 3448, 3451; *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S., at 49.

The prohibition of the distribution of literature by respondents on the concourse floor of the CTA fully satisfies the requirements for the permissible regulation of First Amendment activity in a non-public forum.

Initially, it should be noted that there has never been an allegation that the airport's prohibition against First Amendment activity on the concourse floor of the CTA was adopted to suppress respondents' particular viewpoint. Also, to the extent that air travel-related expressive activity is permitted at the CTA, it is permitted not on the concourse floor but only in rented display cases, counters and offices. Moreover, to the extent that travel-related expressive activity on the part of rent-paying tenants is permitted at such fixed locations and non-travel-related expressive activity by non-tenants is prohibited, such a status-based distinction is eminently reasonable and constitutional in a financially self-supporting airport.

> "Implicit in the concept of the nonpublic forum is the right to make distinctions in access on the basis of subject matter and speaker identity. These distinctions may be impermissible in a public forum but are inherent and inescapable in the process of limiting a nonpublic forum to

> activities compatible with the intended purpose of the property. The touchstone for evaluating these distinctions is whether they are reasonable in light of the purpose which the forum at issue serves."

Perry Education Ass'n v. Perry Local Educators' Ass'n, 460 U.S., at 49 (footnote omitted).

In view of the foregoing, it is evident that LAX's prohibition of respondents' distribution of literature on the concourse floor of the CTA is a permissible regulation of First Amendment activity in a non-public forum. Accordingly, AOCI respectfully submits that the decision below holding that such prohibition was violative of the First Amendment should be reversed and the complaint dismissed.

CONCLUSION

It is respectfully submitted that the foregoing establishes that the Central Terminal Area building of Los Angeles International Airport is neither a traditional public forum, nor a designated public forum, and the prohibition of respondents' distribution of literature in the Central Terminal Area is a permissible regulation of First Amendment activity in a non-public forum. Consequently, the judgment of the United States Court of Appeals for the Ninth Circuit should be reversed and instead this Court should order entry of judgment dismissing the complaint.

Respectfully submitted,

ARTHUR P. BERG
Attorney for *Amicus Curiae*
AIRPORT OPERATORS COUNCIL
INTERNATIONAL (AOCI)
One World Trade Center
Suite 66E
(212) 466-8794

On the Brief:
Arthur P. Berg
Anne M. Tannenbaum
Arnold D. Kolikoff

Dated: New York, New York
November 20, 1986

Supreme Court, U.S.
FILED
NOV 20 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-104

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

BOARD OF AIRPORT COMMISSIONERS OF CITY OF LOS ANGELES,
Petitioner,

vs.

JEWS FOR JESUS, INC.,
Respondent.

On Petition For Writ of Certiorari to the United States Court of Appeals For the Ninth Circuit

BRIEF FOR CITY OF ST. LOUIS, MISSOURI, AMICUS CURIAE IN SUPPORT OF PETITIONER

JAMES J. WILSON,
City Counselor
*EDWARD J. HANLON,
Associate City Counselor
ELKIN L. KISTNER,
Assistant City Counselor
314 City Hall
St. Louis, Missouri 63103
(314) 622-3361
Attorneys for Amicus Curiae City of St. Louis

* Counsel of Record

St. Louis Law Printing Co., Inc., 411 No. Tenth Street 63101 314-231-4477

15 pp

TABLE OF AUTHORITIES

Page

Cases:

Brown v. Louisiana, 383 U.S. 131 (1966) 5

Chicago Area Military Project v. City of Chicago, 508 F.2d 921 (7th Cir.), *cert. denied,* 421 U.S. 992 (1975) 7,9

Cornelius v. NAACP Legal Defense and Educational Fund, Inc., 473 U.S. ____, 87 L.Ed.2d 567 (1985) .5,6,7,8, 9,10,11

Fernandes v. Limmer, 663 F.2d 619 (5th Cir. 1981)..... 7

Flower v. United States, 407 U.S. 197 (1972) 8

Greer v. Spock, 385 U.S. 39 (1966) 5,10

Hague v. CIO, 307 U.S. 496 (1939) 5

Healy v. James, 408 U.S. 169 (1972) 8

Lehman v. City of Shaker Heights, 418 U.S. 298 (1974) . 9

Perry Education Ass'n v. Perry Local Educator's Ass'n, 460 U.S. 37 (1983) 5,6,7,10

Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975) 5

Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969) 5

United States v. Grace, 461 U.S. 171 (1983) 5,6,9

United States Southwest Africa/Namibia Trade & Cultural Council v. United States, 708 F.2d 760 (D.C. Cir. 1983)..... 7

Widmar v. Vincent, 454 U.S. 263 (1981) 5,8,9

Constitutional, Stuatuory and Rules Provisions:

Supreme Court Rule 36.4 1

No. 86-104

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

BOARD OF AIRPORT COMMISSIONERS OF CITY OF LOS ANGELES,
Petitioner,

vs.

JEWS FOR JESUS, INC.,
Respondent.

On Petition For Writ of Certiorari to the United States Court of Appeals For the Ninth Circuit

---

BRIEF FOR CITY OF ST. LOUIS, MISSOURI, AMICUS CURIAE IN SUPPORT OF PETITIONER

This brief is presented for the City of St. Louis, a political subdivision of the State of Missouri, and is sponsored by the authorized law officer thereof. The brief is filed pursuant to Supreme Court Rule 36.4

INTEREST OF AMICUS

The City of St. Louis (Amicus City) owns and operates Lambert-St. Louis International Airport (Lambert), which is located in St. Louis County, Missouri. In response to lower federal court decisions in the mid-1970's declaring a First Amendment right of access to government airport terminals, the City of St. Louis

Airport Authority promulgated a "solicitation rule" which regulated expressive activities at Lambert, effective January 1, 1977. In November of that same year, the International Society For Krishna Consciousness of Missouri, Inc. (Krishna Society) filed a suit against Amicus City and St. Louis County in Missouri Circuit Court which challenged the constitutionality of the solicitation rule. The circuit court's judgment in that lawsuit declared much of the solicitation rule unconstitutional, and permanently enjoined Amicus City and St. Louis County from interfering with Krishna Society's religious activities at Lambert. *International Society For Krishna Consciousness of Missouri, Inc. v. City of St. Louis,* No. 70509-F (April 2, 1979). Amicus City officials therefore currently allow members of Krishna Society to proselytize and solicit contributions at Lambert.

On June 22, 1984, Trans World Airlines discharged Jesse Jamison from employment at its Lambert facilities. Jamison then sought permission from the Director of Lambert (the Director) to protest his discharge from TWA in a heavily trafficked portion of Lambert's main terminal. After his protest request was denied, Jamison filed suit against Amicus City and the Director in the United States District Court for the Eastern District of Missouri in March of 1985. That suit sought a declaration that the process by which the Lambert Director determined who may protest violated the First and Fourteenth Amendments and an injunction ordering Amicus City and the Director to permit Jamison to protest at Lambert.

After a trial on the merits, the District Court issued an order which declared that the method by which Amicus City and the Director determined protest requests was unconstitutional because it vested excessive discretion in the Director. *Jesse Woodson Jamison v. City of St. Louis,* No. 85-536C(5) (July 17, 1986). Although the order enjoined Amicus City and the Director from employing such a method to decide who may use Lambert for expressive activities, it denied Jamison's request for personal injunctive relief.

In a memorandum accompanying its order, the District Court concluded that Lambert was a public forum in which citizens were entitled to engage in First Amendment Activities. It then determined that the Director enjoyed unbridled discretion in determining protest requests in violation of the First and Fourteenth Amendments. The District Court went on to conclude, however, that the denial of Jamison's protest request constituted a reasonable time, place or manner restriction based on its finding that Jamison suffered from a serious mental impairment. The memorandum cited evidence that Jamison had a manic-depressive personality, suffered from radical mood swings, had access to a firearm, and had been indicted for the federal criminal offense of applying for a passport under a false name, but not prosecuted due to a dismissal of the charge by a federal District Court on the basis that Jamison could not appreciate the wrongfulness of the conduct alleged in the indictment.

On August 6, 1986, Jamison appealed to the United States Court of Appeals for the Eighth Circuit from that part of the District Court judgment that denied him personal injunctive relief. Amicus City and the Director cross-appealed on August 27 from that part of the District Court judgment that declared that Lambert is a public forum. The consolidated appeals are currently being briefed by the parties. *Jamison v. City of St. Louis,* Nos. 86-2007EM and 86-2249EM.

As the foregoing litigation history indicates, Amicus City has a profound material interest in the outcome of the instant case. A decision by this Court that government-owned airport terminals are not traditional public fora to which individuals and groups have a right of access for communication would enable Amicus City to enforce a uniform ban on First Amendment activities within the confines of the Lambert terminal. Amicus City believes that such a ruling is not only warranted under established First Amendment law, it is necessary to enable government officials to operate airport terminals safely and efficiently for the benefit of the traveling public.

SUMMARY OF ARGUMENT

This Court determines whether the First Amendment requires government to allow expressive conduct on its property by focusing on the nature of the particular piece of property in question. If the property has a historical association with assembly and debate, or if government officials have intentionally allowed the public to use the property for discourse, then the property constitutes a public forum. Conversely, if neither of those descriptions apply to the particular property, then it is a nonpublic forum. Government may completely ban expressive conduct in nonpublic fora.

The court of appeals' decision in this case holding that the interior of Los Angeles International Airport is a public forum conflicts with precedent of this Court, and is based on a misplaced and incorrect analysis that focuses on the dubious physical resemblance between airport terminals and recognized public fora. Government officials have kept the terminal at Los Angeles International Airport closed to expressive conduct, and terminals lack a significant traditional association with public discourse.

Moreover, the court of appeals' decision ignores the maxim that the government is free to preserve its property for its intended purposes. An affirmance of that decision by this Court would frustrate fulfillment of an airport terminal's predominant purpose, which is to safely and efficiently serve the needs of the traveling public. The public would then have a broad right of access to airport terminals to express views on practically any subject, which would inevitably cause increased congestion and a greater risk of violence in those terminals.

ARGUMENT

This case presents the question whether government officials may uniformly prohibit all individuals and groups from engaging in expressive activity, such as proselytizing, demonstrating, protesting and soliciting contributions, within the confines of a publicly owned airport terminal. Analysis of this question must begin with the premise, which this Court restated just last year, that the government enjoys the same prerogative as the private property owner "to preserve the property under its control for the use to which it is lawfully dedicated." *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*, 473 U.S. ____, 87 L.Ed.2d 567, 578 (1985) (quoting *Greer v. Spock*, 385 U.S. 39, 47 (1966)).

This Court has frequently wrestled with the difficult issue of when the First Amendment compels the government to allow expressive activity on its property. See, e.g., *Cornelius v. NAACP Legal Defense and Educational Fund, Inc., supra; United States v. Grace*, 461 U.S. 171 (1983); *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983); *Widmar v. Vincent*, 454 U.S. 263 (1981); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975); *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969); *Brown v. Louisiana*, 383 U.S. 131 (1966); *Hague v. CIO*, 307 U.S. 496 (1939). Out of this welter of cases involving myriad factual contexts, this Court fashioned a mode of analysis for resolving conflicts between governmental efforts to reserve public properties for uses consistent with the purposes and functions of those properties and attempts by individuals and groups to use those properties as platforms for disseminating and exchanging ideas. This mode of analysis focuses on the nature of the particular property at issue. Thus, the analytical process of resolving a question regarding the right of access to engage in expressive conduct on a particular piece of government property begins with the characterization of that property. See *Cornelius v. NAACP Legal Defense and Educational Fund, Inc., supra*, 87 L.Ed.2d at 578; *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. at 44.

Public property falls into one of three categories for First Amendment purposes. *Cornelius v. NAACP Legal Education and Defense Fund, Inc., supra,* 87 L.Ed. at 579-80; *Perry Education Ass'n v. Perry Local Educators' Ass'n,* 460 U.S. at 45-46. Streets, sidewalks, parks and other similar places which have an historical association with the exercise of free speech rights comprise the first category, and are denominated traditional public fora. See *Cornelius v. NAACP Legal Defense and Education Fund, Inc., supra,* 87 L.Ed.2d at 580. With respect to such places, the First Amendment sets narrow limits on the government's discretion to prohibit or regulate expressive activity. *United States v. Grace,* 461 U.S. at 177.

All other government property falls into one of the two other categories. The second category consists of those public properties that lack the historical association with assembly and debate that defines traditional public fora, but which the government has intentionally opened to expressive conduct. See *Cornelius v. NAACP Legal Defense and Educational Fund, Inc., supra,* 87 L.Ed.2d at 580; *Perry Education Assn. v. Perry Local Educators' Assn.,* 460 U.S. at 45. Such "limited" public fora, see, e.g., *Perry Educ. Assn. v. Perry Local Educators' Assn., supra,* 460 U.S. at 48, are governed by the same standards concerning time, place and manner restrictions and content-based exclusions that apply to traditional public fora. *Id.* at 45-46. Government officials need not indefinitely maintain the open character of limited public fora, however, as they retain their prerogative to prohibit the public, once again, from using such facilities for free speech purposes. *Id.* at 46.[1]

---

[1] Logically, the First Amendment would prohibit government fficials from unreasonably closing a limited public forum to expressive activity to, for example, suppress a particular viewpoint. Cf. *Cornelius v. NAACP Legal Defense and Educational Fund, Inc., supra,* 87 L.Ed.2d at 582, 584 (the government may control access to public property that is not a traditional or limited public forum so long as the restrictions are reasonable and viewpoint neutral).

The last category is, by definition, a residuary class, as it consists of "[p]ublic property which is not by tradition or designation a forum for public communication." *Id.* Thus, a "nonpublic" forum is any government property which is not of a type historically associated with assembly and debate and which has not been opened to expressive conduct. *Cornelius v. NAACP Legal Defense and Education Fund, Inc., supra,* 87 L.Ed.2d at 582. The government may prohibit expressive activity altogether in such nonpublic fora. *Id.* at 591 (Blackmun, J. dissenting). See also, *Perry Ea. Assn. v. Perry Local Educators' Assn., supra,* 460 U.S. at 46.

The court of appeals in the instant case decided that the terminal interior of the Los Angeles International Airport is a traditional public forum and ruled unconstitutional a resolution of the Board of Airport Commissioners of the City of Los Angeles closing that area to First Amendment conduct.[2] In so ruling, the court of appeals principally relied on previous decisions of several circuits of the United States Courts of Appeals which generally stress the superficial structural similarity between terminal interiors and public thoroughfares. See *United States Southwest Afica/Namibia Trade & Cultural Council v. United States,* 708 F.2d 760, 764 (D.C.Cir. 1983); *Fernandes v. Limmer,* 663 F.2d 619, 627 (5th Cir. 1981); *Chicago Area Military Project v. City of Chicago,* 508 F.2d 921, 925 (7th Cir.), *cert. denied,* 421 U.S. 992 (1975). These decisions improperly turn the determination whether an airport terminal is a traditional public forum on the mere physical composition of terminal interiors, citing a debatable resemblance between public streets and terminal common areas, concourses,

---

[2] Because a limited public forum comes into existence only when the government intentionally opens a nonpublic forum to expressive conduct, *Cornelius v. NAACP Legal Defense and Educational Fund, Inc., supra,* 87 L.Ed.2d at 580, any contention that the terminal in question in this case is a limited public forum is meritless in view of the Board of Airport Commissioners' resolution banning all First Amendment activity in the terminal.

restaurants and shops. This Court's decisions in the field of forum analysis not only belie the propriety of such an approach, but strongly suggest that a terminal of a major metropolitan airport is not a public forum.

In *Widmar v. Vincent, supra,* this Court held that a state university converts its campus into a limited public forum by allowing student groups to use its facilities for meetings. By virtue of the definition of a limited public forum, a necessary concomitant of that holding is that a state university is a nonpublic forum absent official acquiescence in the use of its facilities for First Amendment communicative purposes.[3] The court of appeals' conclusion in the instant case that an airport terminal is a traditional public forum is, therefore, consistent with *Widmar* only if an airport terminal has a greater historical association with assembly and debate than a state university. That this is not so hardly requires stating. Institutes of higher education have a long and rich history as fertile arenas for intellectual exchange and cultural intercourse, see, e.g., *Healy v. James,* 408 U.S. 169, 180-81 (1972), that airports certainly lack. The court of appeals' characterization of the terminal at Los Angeles International Airport as a traditional public forum is irreconcilable with *Widmar* and requires a reversal of its decision.

---

[3] In *Cornelius v. NAACP Legal Defense and Education Fund, Inc., supra,* this Court defined a limited public forum as a nonpublic forum which the government has intentionally opened to public discourse. 87 L.Ed.2d at 580. See also, *Perry Ed. Assn. v. Perry Local Ed. Assn., supra,* 460 U.S. at 45-46 (limited public forum is government property "opened for use by the public as a place for expressive activity"). Indeed, this Court employed the same reasoning in support of its conclusion in *Greer v. Spock, supra,* that a military reservation is a nonpublic forum so long as the responsible authorities do not abandon their interest in regulating communicative activities within its confines. 424 U.S. at 838 (distinguishing *Flower v. United States,* 407 U.S. 197 (1972), as standing for the proposition that governmental authorities may convert a military reservation into a public forum by acquiescing in general expressive conduct).

An affirmance of the Court of Appeals' decision in this case would not only conflict with the logical import of *Widmar,* it would also empty of any practical significance the principle that the government has the same power as the private property owner to deny uses of its property that would be inconsistent with the purpose to which it dedicated the property, *Cornelius v. NAACP Legal Defense and Educational Fund, Inc., supra,* 87 L.Ed.2d at 578. The purpose of a major metropolitan airport terminal is to provide a safe, secure, efficient and pleasant nexus for the linkage of air and ground forms of transportation. The mere fact that an airport's officials allow the public to use a terminal's facilities that are only incidentally related to the terminal's principal purpose, such as restaurants, shops, and arcades, does not mean that an airport terminal is a public forum. See *United States v. Grace, supra,* 461 U.S. at 177 (public property is not a public forum merely because members of the public are freely admitted).[4] When the government owns or operates an airport terminal, it is engaged in a commercial venture, the overarching purpose of which is to serve the traveling public. See *Lehman v. City of Shaker Heights,* 418 U.S. 298, 303 (1974) (city bus advertising spaces not a public forum since commercial use of the property inconsistent with public forum status).

In analyzing whether a particular piece of property is a public forum, this Court has looked to whether expressive activity would be consistent with the principal purpose of the property. See, e.g., *Cornelius v. NAACP Legal Defense & Educational*

---

[4] In *Chicago Area Military Project v. City of Chicago, supra,* 508 F.2d at 925, upon which the court of appeals heavily relied in this case, the Seventh Circuit reasoned that "great numbers of people [visit] terminal buildings not only in connection with air travel, but also for shopping, dining, sightseeing, or merely to satisfy their curiosity." Not only would this be undeterminative of the question whether an airport terminal is a traditional public forum, the court's conclusion that great numbers of people flock to airport terminals for purposes unrelated to travel is questionable.

Fund, Inc., supra, 87 L.Ed.2d at 581-82 (federal work place exists to conduct business and is a nonpublic forum); *Greer v. Spock, supra,* 424 U.S. at 837-38 (purpose of military reservation is to train soldiers and it is not a public forum).

If this Court were to hold that an airport is a public forum, it would impair the ability of government officials to ensure fulfillment of an airport terminal's principal purpose of efficiently and safely serving the traveling public. See *Cornelius v. NAACP Legal Defense and Educational Fund, Inc., supra,* 87 L.Ed.2d at 582 (government enjoys right to restrict access to federal workplace to avoid interruptions). Just as the government must enjoy wide latitude in managing the federal workplace, *id.*, the government must have considerable discretion in managing heavily trafficked and congested airport terminals. Characterization of an airport terminal as a traditional public forum would compel government officials to permit expressive conduct by any and all persons and would impose extremely stringent standards on content-based exclusions. See *Perry Educ. Ass'n v. Perry Local Educators' Ass'n, supra,* 460 U.S. at 45. Airport officials would then be hard-pressed to justify rules prohibiting expression on potentially inflammatory topics. Any individual would be free to use an airport terminal to express his or her viewpoint on, for example, relations between the United States and Libya, or the morality of abortion, unless government officials were confident they could demonstrate that the exclusion of expression on that topic was based on a compelling state interest and was narrowly drawn to achieve that end. *Id.* Viewpoint expression on such emotionally charged and divisive issues would carry a high potential for disruption of the orderly flow of travellers within the crowded confines of an airport terminal, since those passersby who hold contrary viewpoints might seize the opportunity to engage in actual debate, thus further congesting terminal concourses and corridors. It is also common knowledge that airports provide appealing and susceptible targets for terrorists, and the addition of viewpoint expression on inflammatory political topics would

increase the possibility of violence at airport terminals. Those demonstrators themselves could become the focus of terrorists atrocities, thereby endangering innocent bystanders as well.

It is no answer that these concerns are instead relevant to the determination of reasonable time, place and manner restrictions. That these concerns are particularly acute in the airport terminal context demonstrates the inherent incompatibility between expressive conduct and the legitimate business to which airport terminals are dedicated. A pronouncement by this Court that terminals of major metropolitan airports are not public fora would not deprive the public of any right. A speaker does not enjoy a First Amendment right of access to a particular piece of government property merely because it provides the best situs for delivery of the speaker's message. *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*, 87 L.Ed.2d at 584. Furthermore, the availability of alternative channels of communication, such as streets, sidewalks, and parks, ensures that the speaker is able to reach the same audience that patronizes airport terminals. *Id.* In short, characterization of government airport terminals as nonpublic fora would have only an insignificant impact on the public's overall ability to engage in expressive activities, but it would greatly enhance the ability of government officials to operate those terminals in a safe, secure, efficient and pleasant manner for the benefit of the traveling public.

CONCLUSION

The instant case presents this Court with the opportunity to give practical meaning to the principle that the government, no less than the private citizen, enjoys the prerogative to preserve its property for its intended use. The foregoing authorities and forceful policy arguments demonstrate that the interiors of government owned or operated airport terminals are not traditional public fora. It follows that the resolution of the Board of Airport Commissioners of the City of Los Angeles was a reasonable and constitutional exercise of its power to preserve the terminal interior of Los Angeles International Airport for its lawfully dedicated purpose of serving the traveling public. Wherefore, this Court should reverse the judgment of the court of appeals in this case.

JAMES J. WILSON,
City Counselor
*EDWARD J. HANLON,
Associate City Counselor
ELKIN L. KISTNER,
Assistant City Counselor
314 City Hall
St. Louis, Missouri 63103
(314) 622-3361

Attorneys for Amicus Curiae
City of St. Louis

*Counsel of Record

Supreme Court, U.S.
FILED
DEC 23 1986
JOSEPH F. SPANIOL, JR.
CLERK

(7)

No. 86-104

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

BOARD OF AIRPORT COMMISSIONERS
OF THE CITY OF LOS ANGELES, *et al.*,
Petitioner,

v.

JEWS FOR JESUS, INC., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF AMICUS CURIAE OF CHRISTIAN LEGAL SOCIETY AND NATIONAL ASSOCIATION OF EVANGELICALS IN SUPPORT OF RESPONDENTS

Of Counsel:

FOREST D. MONTGOMERY
NATIONAL ASSOCIATION
OF EVANGELICALS
1430 K Street, N.W.
Washington, D.C. 20005
(202) 628-7911

MICHAEL J. WOODRUFF
Counsel of Record
SAMUEL E. ERICSSON
KIMBERLEE W. COLBY
MICHAEL A. PAULSEN
CENTER FOR LAW &
RELIGIOUS FREEDOM
Post Office Box 1492
Merrifield, Virginia 22116
(703) 560-7314

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

25 pp

QUESTION PRESENTED

Whether government officials may make and enforce a policy banning all "First Amendment activities" in the main terminal area of a public airport.

TABLE OF CONTENTS

	Page
INTEREST OF AMICI	1
SUMMARY OF ARGUMENT	2
ARGUMENT	5
I. THIS CASE PRESENTS THE QUESTION OF WHETHER THE INHERENT NATURE OF THE AIRPORT TERMINAL IS "PUBLIC" OR "NONPUBLIC"	5
II. THE MAIN TERMINAL FACILITY OF A PUBLIC AIRPORT IS OF LIKE NATURE AND CHARACTERISTIC AS FORA WHICH TRADITIONALLY HAVE BEEN HELD AVAILABLE FOR FIRST AMENDMENT EXPRESSION SUBJECT ONLY TO NEUTRAL TIME, PLACE AND MANNER REGULATIONS	10
III. A PER SE BAN ON FIRST AMENDMENT ACTIVITY IN AN AIRPORT TERMINAL IS NOT RATIONALLY RELATED TO THE STATE INTEREST IN PRESERVING THE TERMINAL'S PRINCIPAL FUNCTIONS FROM DISRUPTION	14
IV. RESPONDENTS' INTENDED SPEECH IS DESERVING OF CONSTITUTIONAL PROTECTION OF THE HIGHEST ORDER	16
CONCLUSION	18

TABLE OF AUTHORITIES

CASES: Page

Adderley v. Florida, 385 U.S. 39 (1966) 9, 13
Cantwell v. Connecticut, 310 U.S. 296 (1940) 16
Chicago Area Military Project v. City of Chicago, 508 F.2d 921 (7th Cir.), *cert. denied*, 421 U.S. 992 (1975) 3
City Council v. Taxpayers for Vincent, 466 U.S. 789 (1984) 10, 11, 12
Cornelius v. NAACP Legal Defense Fund, 105 S.Ct. 3439 (1985) 5, 6, 12
Edwards v. South Carolina, 372 U.S. 229 (1963) .. 18
Fernandes v. Limmer, 633 F.2d 619 (5th Cir. 1981), *cert. denied*, 103 S.Ct. 5 (1982) 2
Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) 11
Grayned v. Rockford, 408 U.S. 104 (1972) 13
Greer v. Spock, 424 U.S. 828 (1976) 9, 12, 13
Hague v. CIO, 307 U.S. 496 (1939) 5, 9, 10
Heffron v. International Society for Krishna Consciousness, 452 U.S. 640 (1981) 5
Hoffman Estates v. Flipside, Hoffman Estates, 455 U.S. 489 (1982) 15
ISKCON v. Eaves, 601 F.2d 809 (5th Cir. 1979) .. 3
ISKCON v. Engelhardt, 425 F. Supp. 176 (W.D. Mo. 1977) 3
ISKCON v. Griffin, 437 F. Supp. 666 (W.D. Pa. 1977) 3
ISKCON v. Rochford, 585 F.2d 263 (7th Cir. 1978) 3
ISKCON v. Wolke, 453 F. Supp. 869 (E.D. Wis. 1978) 3
Jamison v. Texas, 318 U.S. 413 (1943) 14
Jones v. North Carolina Prisoner's Union, 433 U.S. 119 (1977) 13
Keyishian v. Board of Regents, 385 U.S. 589 (1967) 14
Kuszynski v. City of Oakland, 479 F.2d 1130 (9th Cir. 1973) 3
Lloyd Corp., Ltd. v. Tanner, 407 U.S. 551 (1972) .. 9, 12
Lovell v. City of Griffin, 303 U.S. 444 (1938) 11

TABLE OF AUTHORITIES—Continued

	Page
Marsh v. Alabama, 326 U.S. 501 (1946)	9, 14
Martin v. City of Struthers, 319 U.S. 141 (1943)	16
Moskowitz v. Cullman, 432 F. Supp. 1263 (D.N.J. 1977)	3
Murdock v. Pennsylvania, 319 U.S. 105 (1943)	16, 17, 18
Niemotko v. Maryland, 340 U.S. 268 (1951)	16
Perry Education Assn. v. Perry Local Educators' Assn., 460 U.S. 37 (1983)	5, 6, 10, 12
Police Department of Chicago v. Mosley, 408 U.S. 92 (1972)	6
Rosen v. Port of Portland, 641 F.2d 1243 (9th Cir. 1981)	3, 15
Schad v. Borough of Mount Ephraim, 452 U.S. 61 (1981)	13, 14
Schneider v. State, 308 U.S. 147 (1939)	14, 16
Shuttlesworth v. Birmingham, 394 U.S. 147 (1969)	15, 18
Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975)	5, 6, 14
Thomas v. Review Board, 450 U.S. 707 (1981)	17, 18
Thornhill v. Alabama, 310 U.S. 88 (1940)	15
United States v. Albertini, 53 U.S.L.W. 4844 (June 24, 1985)	18
United States v. Grace, 461 U.S. 171 (1983)	8, 9, 14
United States v. O'Brien, 391 U.S. 367 (1968)	18
United States Postal Service v. Greenburgh Civic Assn., 453 U.S. 114 (1981)	8, 9, 10, 12
U.S. Southwest Africa/Namibia Trade and Cultural Council v. United States, 708 F.2d 760 (D.C. Cir. 1983)	2
West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943)	17
Widmar v. Vincent, 454 U.S. 263 (1981)	5, 6
Wisconsin v. Yoder, 406 U.S. 205 (1972)	17, 18
Witters v. Washington Department of Services for the Blind, 106 S.Ct. 748 (1986)	6
Wolin v. Port of New York Authority, 392 F.2d 83 (2d Cir. 1968)	3
Zwickler v. Koata, 389 U.S. 241 (1967)	15

TABLE OF AUTHORITIES—Continued

OTHER AUTHORITIES:

	Page
THE FEDERALIST No. 51 (J. Madison) (G. Wills, ed. 1982)	17
M. Nimmer, *Nimmer on Freedom of Speech* (1984)	8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-104

BOARD OF AIRPORT COMMISSIONERS
OF THE CITY OF LOS ANGELES, *et al.*,
Petitioner,

v.

JEWS FOR JESUS, INC., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF AMICUS CURIAE OF CHRISTIAN LEGAL SOCIETY AND NATIONAL ASSOCIATION OF EVANGELICALS IN SUPPORT OF RESPONDENTS

INTEREST OF AMICI

The Christian Legal Society is a non-profit professional association of 3,500 Christian judges, attorneys, law professors and law students, founded in 1961. The Center for Law and Religious Freedom is a division of the Christian Legal Society founded in 1975 to protect the free exercise of religion, supporting the appropriate accommodation by the state of religious beliefs and practices and the respect for religious rights as required by the First Amendment, thus strengthening the individual

citizen's respect for, and allegiance to, our constitutional government.

The National Association of Evangelicals, located in Wheaton, Illinois, is a non-profit association of evangelical Christian organizations, colleges, and universities, as well as some 44,000 churches from 74 denominations. It serves a constituency of 10 to 15 million people.

The letters from the parties consenting to the filing of this brief are submitted herewith to the Clerk pursuant to Rule 36.2.

SUMMARY OF ARGUMENT

This case presents, for the first time in this Court, an issue on which there has been uncommon agreement in lower federal courts—the availability of areas of unrestricted general access in public airports for traditional forms of First Amendment expression. The question before this Court is quite narrow—whether municipal authorities may make and enforce a *per se* exclusion of all "First Amendment activity" in open areas of a public airport terminal.

This Court has held that the state may not enforce such a blanket prohibition of speech in places where the general public traditionally has enjoyed a right of access and where First Amendment expression, subject to reasonable time, place and manner restrictions, would not disrupt the principal function of such property. In the present case, the main terminal area of LAX Airport is such a characteristically "public forum," possessing the same features that have made traditional places of expression like public streets and parks "quintessential" public fora, a conclusion reinforced by the overwhelming agreement of the lower federal courts that have passed on this question.[1]

---

[1] *U.S. Southwest Africa/Namibia Trade and Cultural Council v. United States*, 708 F.2d 760, 764 (D.C. Cir. 1983); *Fernandes*

Amici submit this brief to emphasize four key points:

(1) This case presents no question (on the record before this Court) concerning a "limited" or "state-created" public forum. Petitioners' plain intent is to reserve all areas of the airport facility for non-speech uses, if it is lawful for them to do so. Such an intent, of course, cannot transform a *traditionally* or *characteristically* public forum into a "nonpublic" forum. (Petitioners now concede this, in what appears a substantial departure from the position taken in the petition for certiorari.) The central question in this case is which of these latter two categories—traditional public forum or "nonpublic" area —better applies to the main terminal area of a public airport.

(2) The forum in question here—the main terminal area at LAX—possesses the same characteristics as other traditional public fora. The term "traditional" public forum is not so narrow as to exclude other examples of the *types* of places and situations in which communication of ideas has traditionally been accorded broad latitude. A forum sharing the same essential characteristics as another forum that has traditionally been deemed open for First Amendment activity subject only to limited, neutral time and manner restrictions, should be treated in like manner. These characteristics, discerned from this

---

v. Limmer, 633 F.2d 619, 626 (5th Cir. 1981), *cert. denied*, 103 S.Ct. 5 (1982) ("It is now generally well established that airport terminals owned and administered by governmental entities are public forums. . ."); *Rosen v. Port of Portland*, 641 F.2d 1243 (9th Cir. 1981); *ISKCON v. Eaves*, 601 F.2d 809 (5th Cir. 1979); *ISKCON v. Rochford*, 585 F.2d 263 (7th Cir. 1978); *Chicago Area Military Project v. City of Chicago*, 508 F.2d 921 (7th Cir.), *cert. denied*, 421 U.S. 992 (1975); *Kuszynski v. City of Oakland*, 479 F.2d 1130 (9th Cir. 1973); *ISKCON v. Wolke*, 453 F. Supp. 869 (E.D.Wis. 1978); *ISKCON v. Griffin*, 437 F. Supp. 666 (W.D. Pa. 1977); *ISKCON v. Engelhardt*, 425 F. Supp. 176 (W.D.Mo. 1977). *See Wolin v. Port of New York Authority*, 392 F.2d 83 (2d Cir. 1968) (bus terminal); *Moskowitz v. Cullman*, 432 F. Supp. 1263 (D.N.J. 1977) (bus and train terminal).

Court's decisions, are basically two: The existence of a traditional, general right of access by broad segments of the general public and the compatibility of First Amendment expression (under certain rules) with the principal function of the property.

(3) The regulation fails the constitutional requirement of a rational relation between a speech restriction and the objective to be served by such a restriction. Even were the main terminal area not a "public forum," regulation that impinges so directly on protected expression must be subjected to exacting scrutiny of its breadth and rationality. Here, regardless of the legal standard employed, it must be acknowledged that a *per se* ban on all "First Amendment activity," without limitation or principled standards of application, is wantonly overbroad and bears only the most wooden relation to petitioners' stated desire to preserve the terminal facilities' intended functions of facilitating travel and aiding travellers.

(4) Finally, *amici* wish to emphasize what does not appear to be disputed—the importance of the pure speech and the need to protect such minority rights of free expression. The importance of the speech here is doubly reinforced by its religious nature. Free exercise rights, as well as those of free speech and press, are implicated by the Board's policy, as many religious groups (such as Jews for Jesus) believe it an affirmative responsibility of their faith to communicate their message to others. The uninhibited, robust and wide-open competition of religious ideals has traditionally held a value as high in our republic as like debate of political positions and ideas.

ARGUMENT

I. THIS CASE PRESENTS THE QUESTION OF WHETHER THE INHERENT NATURE OF THE AIRPORT TERMINAL IS "PUBLIC" OR "NON-PUBLIC".

The extent to which government may limit access to a public facility for constitutionally protected speech depends on whether the forum may be characterized as "public" or "nonpublic." *Cornelius v. NAACP Legal Defense Fund*, 105 S.Ct. 3439 (1985); *Perry Education Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 44 (1983). This Court's decisions have recognized three categories of public property or facilities for purposes of evaluating the extent to which government may lawfully restrict speech in such facilities.

The first category consists of areas in which members of the general public traditionally or typically enjoy an affirmative right of access for protected speech activities. Such areas have included sidewalks, streets and public parks. *Id.* at 45. *Hague v. CIO*, 307 U.S. 496, 515 (1939). The state may justify content-based restrictions on speech in such fora only for compelling purposes and only by regulations narrowly tailored to achieve such ends. *Perry*, 460 U.S. at 45. The state may also enforce neutral time, place and manner regulations. *Id.* at 45.

The second category consists of fora that the state has created for public speech or the unique expressive activity of different groups. *See, e.g., Widmar v. Vincent*, 454 U.S. 263 (1981); *Heffron v. International Society for Krishna Consciousness*, 452 U.S. 640 (1981); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975). In these contexts, the right of access is one of *equality*, rather than affirmative entitlement. The state may not exclude from such a "limited open forum" persons or

groups similarly-situated to others that are included, based upon the content of their speech. *Widmar, supra*; *Southeastern Promotions, supra. See also Police Department of Chicago v. Mosley*, 408 U.S. 92 (1972).

The third category consists of nonpublic fora—those areas in which the state manifestly has not evinced an intent or policy to open its facilities for indiscriminate use by similarly-situated persons, but has evidenced a contrary intent to reserve the "forum" for certain designated uses closely tied to the demonstrably nonpublic character of the facility or medium in question. *Cornelius*, 105 S. Ct. 3439; (Combined Federal Campaign); *Perry*, 460 U.S. 37 (internal mail system of public school).

It is important to emphasize that the second category—selective exclusion from limited open fora made available by government for speech—is not relevant in this case. There can be little doubt that the Los Angeles airport terminal is not a characteristically "public" forum, it has not been made one by government policy. The Board's policy could not be more clear (or more sweeping) in this respect. The Board does not desire to create, and does not appear to have created, a *limited* public forum.[2] It apparently means to keep out all "First Amendment activity," if it be lawful to do so.

---

[2] Neither the court of appeals nor the district court found it necessary to pass on respondents' alternative arguments concerning selective enforcement of this policy, which would be tantamount to discriminatory exclusion from a *de facto* "forum" of sorts. The Ninth Circuit noted that "[t]he district court ruled that the CTA is a traditional public forum, declared the total ban on First Amendment activities unconstitutional on its face, and declined to reach the other issues raised by Jews for Jesus." 765 F.2d at 792. Were this Court to reverse the judgment below, respondents would still be entitled to a trial on this issue. *Amici* do not believe it proper for this Court to decide this question on the record before it. *Cf. Witters v. Washington Department of Services for the Blind*, 106 S.Ct. 748, 751-752 (1986).

As petitioners now concede,[3] if a public area or facility is *by nature* a public forum, the state may not nullify

---

[3] See Pet. Br. at 7 ("if the interiors of [airport] facilities are traditional public forums . . . then non-airport related activities protected by the First Amendment must be allowed within the terminals restricted only by 'time, place and manner restrictions.'"); *id.* at 13 (same). This concession is a marked departure from the manner in which petitioners framed the issue presented in their petition for certiorari. In that submission, petitioners urged this Court to review the judgment below on the grounds that the main terminal area of LAX could not be classified for First Amendment purposes among such traditional fora as streets and parks *because* of the City's policy banning all First Amendment activity at the airport. *See* Cert. Pet. at 7 (decision below "can only be the result of a total disregard of the holdings . . . by this Court regarding the right of a government to limit the uses of its facilities to their dedicated and intended purposes and to disallow any other uses of those facilities whether those unrelated uses are protected or not."); *id.* at 9 (interiors of public airport facilities not traditional public fora but "[r]ather, they are intended, designed and dedicated to their airport-related purposes.").

Petitioners have now abandoned this position, perhaps in belated recognition that it lacks merit (as we argue in the text). Yet, this category mistake—the belief that whether a facility is a natural or traditional public forum depends on whether government has intended voluntarily to create such a forum—was both the primary argument advanced for reviewing the judgment below, and the premise on which petitioners had sought to distinguish *all* of the holdings of lower federal courts that support the position taken by the Ninth Circuit in this case. See Cert. Pet. at 6-7 (decision below followed "inappropriate, discredited, or inapplicable" lower court authority which "falls like a house of cards" given proposition that government may reserve a forum for designated uses.); *id.* at 9. Petitioners had sought to distinguish those holdings on the basis that they involved challenges to time, place and manner regulations and not a *per se* ban on all First Amendment activity. Cert. Pet. at 9 (fact that "some airport operators have opened their facilities to non-airport related activities" does not mean that airports are traditional public fora). Petitioners' premise appeared to have been that making such regulations somehow *created* the fora in those cases and that airport officials might validly have prohibited all First Amendment activity but voluntarily elected not to do so. There is absolutely no support for such a supposition in the lower court opinions, cited *supra*, n.1. Rather, the uniform premise ap-

that nature by the bare fact of attempted regulation. *United States v. Grace*, 461 U.S. 171, 180 (1983); *United States Postal Service v. Greenburgh Civic Assn.*, 453 U.S. 114, 133 (1981). A contrary position would permit state officials to regulate speech in all public areas. The state would simply characterize the facility in question as "nonpublic" or "limited to designated uses" by virtue of the deliberate decision to restrict speech in such

---

pears to have been that speech in such fora can only be regulated by narrow time, place and manner rules because of the characteristically and essentially "public" nature of such places. Petitioners have *abandoned* this argument entirely in their brief on the merits, now acknowledging that if airports are by nature or tradition public fora, First Amendment activity may not be made the subject of a flat prohibition (as it was here), but only neutral time, place and manner rules.

Significantly, petitioners' shift also abandons any pretense that the blanket restriction on speech is designed to serve a *non*-speech state goal rather than simply the nakedly *anti*-speech state goal of keeping First Amendment activity out of the airport terminal. The only interest petitioners have ever asserted in banning speech is the supposed *right* to do so *without justification or explanation*, as an incident of the right to reserve the forum for its dedicated uses, Pet. Br. at 24; *see generally* M. Nimmer, *Nimmer on Freedom of Speech*, Sec. 2.04 at 2-25 - 2-26 (1984), a justification that has no force whatsover if the terminal area is classified with other traditional public fora.

Amici believe that petitioner's earlier position was plainly wrong and is now wisely discarded. But the question this Court must now decide is whether, in light of this decided shift in position and abandonment of any argument that the decisions of other federal courts are either in conflict with or meaningfully distinguishable from the decision below or based on a subsequently discredited rationale, the writ of certiorari should now be dismissed as improvidently granted or the judgment below summarily affirmed.

Notwithstanding the lack of any conflict among lower courts and the abandonment by petitioners of the rationale on which review was originally sought, *amici* urge this Court to decide this case on the merits, with full opinion, because of the importance of the issue involved and the opportunity to clarify the rights of citizens to free expression and communication of ideas in fora traditionally made open to the public and not incompatible with such expression.

an area; the restriction in turn would be justified by the characterization.

Such a circular argument has never been accepted by this Court. If public walkways and streets in a downtown area are quintessential fora for speech, they may not be transformed into more "limited" fora or rendered "nonpublic" by an ordinance banning leafletting on those same sidewalks or street corners. *Grace*, 461 U.S. at 180; *Greenburgh*, 453 U.S. at 133. Likewise, if a public airport's main terminal area has the nature and characteristics of such traditional public fora—the question which this Court is to decide—a government policy banning all First Amendment activity in such a forum cannot perforce be deemed to change the nature of the public facility or public area in question, but is instead an unconstitutional abridgment of the freedom of speech in such an area. Simply put, government cannot by fiat make a forum which is public by nature or characteristic, "nonpublic" or "limited."

The question before the Court, therefore, is whether the public facility in question falls in the first or the third category; whether the airport's main terminal area is essentially "public" or "nonpublic" in character, more closely resembling fora such as public streets and sidewalks, or areas like military reservations, jailhouse courtyards, letterboxes and private shopping centers. *Compare Hague*, 307 U.S. 496; *Marsh v. Alabama*, 326 U.S. 501 (1946), *with Greer v. Spock*, 424 U.S. 828 (1976), *Adderley v. Florida*, 385 U.S. 39 (1966) and *Lloyd Corp., Ltd. v. Tanner*, 407 U.S. 551 (1972). To this question we now turn.

II. THE MAIN TERMINAL FACILITY OF A PUBLIC AIRPORT IS OF LIKE NATURE AND CHARACTERISTIC AS FORA WHICH TRADITIONALLY HAVE BEEN HELD AVAILABLE FOR FIRST AMENDMENT EXPRESSION SUBJECT ONLY TO NEUTRAL TIME, PLACE AND MANNER REGULATIONS.

This Court has noted that whether certain governmental property is public or nonpublic in character (for First Amendment purposes) involves the placement of the facility in question along a "spectrum" of situations, *Perry*, 460 U.S. at 45, ranging from "quintessential public forums" such as streets, parks, and sidewalks on the one hand, to cases involving private property or closed governmental property on the other. The first category of situations is sometimes referred to as representing "traditional public fora." But the term "traditional public forum" might misleadingly suggest that there can be *no* more fora of like kinds to add to the narrow listing given by the Court in *Hague* in 1939—streets, parks and highways. Surely this is not the case. The term "traditional" public forum is not so narrow as to exclude other examples of the *types* of places or contexts in which free and open expression of ideas has traditionally been accorded the broadest latitude, and this Court has not employed it so restrictively. Rather, what must be demonstrated is a traditional right of access *comparable* to that recognized for public streets, sidewalks and parks. *City Council v. Taxpayers for Vincent*, 466 U.S. 789, 814 (1984); *see Greenburgh*, 453 U.S. at 133 (addressing question whether letterboxes may "properly be *analogized* to streets and parks.") (emphasis added).[4]

---

[4] First Amendment principles are obviously transferable from the traditional phenomena which they originally were designed to address to new examples of such phenomena developed by changes in technology. For example, electronic mass media are accorded the same constitutional protection of freedom of the press as are printed media, notwithstanding the fact that such new developments

"Traditional," as used in this Court's cases, refers to the *right of access*, not the recognition of the facility as a public forum. *Vincent*, 466 U.S. at 814. But as society changes, the "traditional" congregating places, areas of heavy pedestrian traffic and of general public access change along with it. Public airport terminals have "traditionally" accorded the right of access to broad segments of the general public, in the sense that they have been open for public egress and ingress since their inception.[5] Our mobile modern society has produced a new set of roadways in the sky; the airport corridor of today is the streetcorner of yesterday, its main terminal area little different from a sidewalk bus stop. And while few would find in airport terminals the same pleasing features as public parks, the features that traditionally have made sidewalks and parks attractive places for speakers with a particular message to meet and talk with large numbers of persons from many walks of life are undeniably present in large public airport facilities. People come and go (sometimes hurriedly but frequently less so), wander about, read newspapers and—typically—wait.[6]

---

could not specifically have been contemplated by the framers of the First Amendment. *See, e.g., Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); *Lovell v. City of Griffin*, 303 U.S. 444, 452 (1938) ("The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion.").

[5] LAX is no different from any other large airport in this respect. Access to members of the general public is broad-based and, as a practical matter, virtually unrestricted. See Pet. Br. at 5 ("The general public is not denied entrance into the terminal facility.").

[6] Airport terminals are notorious as places where persons suddenly and unexpectedly may find travel schedules changed, as anyone who has travelled through Chicago O'Hare or Denver Stapleton during the winter months can attest. It is perhaps fair to say that such times are good for little else *besides* First Amendment activity—be it reading a newspaper or magazine, engaging in conversation with another traveller, or watching television.

Just as important as the similarities of airport terminals to traditionally "public" fora are the contrasts between such areas and fora that this Court has found "nonpublic." Surely it must be acknowledged that, in terms of characteristics and customary access, airport corridors more closely resemble public streets and sidewalks than they do letterboxes for receipt of U.S. mail (*Greenburgh*), municipal utility poles (*Vincent*), the combined Federal Campaign fund drive in the federal workplace (*Cornelius*), a school's internal mail system (*Perry*), or a military post (*Greer*). The latter are not broadly and generally available to the public. Such facilities have characteristics so different from airport terminals that they understandably can be treated as public fora only to the extent that deliberate government policy has made them so. While airport corridors might be most closely analogized to the plazas of a large, modern shopping center (*compare Lloyd Corp., Ltd., supra*), the crucial feature distinguishing the two places is the fact that airport terminals are *public* property, not purely private property dedicated to commercial uses.

Significantly, it is not the initially or primarily intended use of the public property in question that makes it a quintessential forum for speech, but the characteristics of broad public access and the potential to reach a large audience at relatively small expense and without undue disruption of the property's primary use. In this respect, petitioners' argument that airport terminals differ *in character* from public streets and walkways, because designed for travel and commerce, is wholly unpersuasive. Sidewalks and streets, like airport terminals and corridors, are designed and intended to facilitate transportation and commerce, not speech. It is not, as petitioners suggest (Pet. Br. at 15, 16), that such facilities were *designed* for speech that is important, but that they are public facilities whose use for First Amendment expression by members of the public is *not incompatible*

with the use to which the premises are dedicated or primarily devoted. *Schad v. Borough of Mount Ephraim*, 452 U.S. 61 (1981); *Grayned v. Rockford*, 408 U.S. 104, 116 (1972); *Greer v. Spock*, 424 U.S. 828, 843 (1976) (Powell, J., concurring).

This, we submit, is the principle that emerges from the consistent course of this Court's decisions. Where access to the forum is broadly available to members of the general public, and where the nature of the property is not inconsistent with expressive activity (see, e.g., *Jones v. North Carolina Prisoner's Union*, 433 U.S. 119 (1977)), such that the principal function of the property would be disrupted by First Amendment activity (*Greer v. Spock*, 424 U.S. 828 (1976) (military reservations); *Adderley v. Florida*, 385 U.S. 39 (1966) (jailhouse grounds)), the forum is *characteristically* (even where not "traditionally") "public," and First Amendment activity may not flatly be banned, but may only be regulated by focused and neutral rules concerning the time, place and manner of speech.

The areas of unrestricted general access in a public airport terminal possess the same essential characteristics as traditional fora such as streets and sidewalks, and should be treated in like manner. That does not mean, of course, that airport officials may not enact reasonable time, place and manner regulations specifically tailored to the unique nature of the particular forum. But that plainly is not the nature of the resolution at issue in this case. The City has not attempted a narrow regulation of First Amendment activity, designed to maintain order or decorum, to minimize disruption or noise in congested areas, to avoid harassment of travelers, or to handle a temporary, aberrational situation.[7] It has en-

---

[7] It appears that the policy may have been enacted to address the situation presented by the extraordinary security demands placed on LAX during the period surrounding the 1984 Summer

acted instead a *per se* ban on "First Amendment activity."[8] Plainly, such a flat prohibition on constitutionally protected speech fails the requirement of "[p]recision of regulation . . . in an area so closely touching our most precious freedoms." *Keyishian v. Board of Regents*, 385 U.S. 589, 604 (1967). Like prohibitions have consistently been invalidated by this Court. *See, e.g., Marsh v. Alabama*, 326 U.S. 501 (1946); *Jamison v. Texas*, 318 U.S. 413 (1943); *Schneider v. State*, 308 U.S. 147 (1939); *cf. Schad v. Borough of Mount Ephraim*, 452 U.S. 61 (1981). The City's flat ban on speech in a characteristically public forum was properly struck down by both courts below.

III. A PER SE BAN ON FIRST AMENDMENT ACTIVITY IN AN AIRPORT TERMINAL IS NOT RATIONALLY RELATED TO THE STATE INTEREST IN PRESERVING THE TERMINAL'S PRINCIPAL FUNCTIONS FROM DISRUPTION.

As noted above, petitioners' regulation makes no pretense of regulating an area affecting First Amendment freedoms in a focused, precise manner. While it is obvious that such a sweeping prohibition cannot pass for a mere time, place or manner restriction, it is also the

---

Olympic Games. Whatever the merits of the regulation during such a period, the retention of such a regulation as an ongoing policy is surely unjustified either as a time, place or manner regulation or in place thereof.

[8] The suggestion that the allowance of First Amendment activity in sidewalk areas outside the terminal is somehow a mere time, place or manner regulation is specious. It is well-settled that the availability of alternative fora cannot, without more, justify a total ban on communicative activity in the public forum in which the speaker desires to have his message heard. *Grace*, 461 U.S. at 180-181; *see Schneider v. State*, 308 U.S. 147, 163 (1939) ("[O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place."); *Southeastern Promotions*, 420 U.S. at 556 (quoting *Schneider* with approval).

case that the ordinance cannot survive even the less exacting requirement of *rationality* of regulation that is required even in a "nonpublic" forum.

The ordinance bears only the most remote and wooden relation to petitioners' stated objective of preserving the airport's ability to serve the needs of the travelling public. First, its overbreadth is extraordinary. Read broadly and literally, the resolution bans far more than leafletting by non-passengers but also prohibits the vending and reading of newspapers and any non-airport related conversation between passengers. Surely the Board of Airport Commissioners intended no such result, which would certainly be considered "irrational." [9] But if it did not, then the severe overbreadth of the statute produces a second insuperable problem of irrationality, related to the requirement of Due Process—the complete lack of clear and predictable standards of application for the Resolution. *See generally Zwickler v. Koata*, 389 U.S. 241 (1967); *id.* at 250; *see, e.g., Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489 (1982); *Thornhill v. Alabama*, 310 U.S. 88 (1940). The lack of such standards leaves virtually unfettered discretion in the hands of the enforcing authority. *Compare Shuttles-*

---

[9] While such enforcement might seem unimaginable, there are a number of hypothetical cases that lie along a continuum of real-life situations. For example, if a passenger deplaning an airplane after talking with other passengers handed each of them religious literature, could he be prosecuted for such conduct? (This appears to be quite close to the actual facts of *Rosen v. Port of Portland*, 641 F.2d 1243 (9th Cir. 1981)). If a person who came to the airport to meet an arriving passenger discovered that the plane was late, could he pass out pamphlets on a public issue to others waiting in the same area with whom he had struck up a conversation? Could a traveller who became distressed upon discovering that an airport newsstand was selling adult magazines communicate that displeasure and the reasons for it to other persons in the vicinity? Would it matter if he communicated his feelings to more than a handful of persons?

worth v. Birmingham, 394 U.S. 147 (1969); *Niemotko v. Maryland*, 340 U.S. 268 (1951).

Amici do not here argue that petitioners' policy has, in fact, been selectively enforced. Such a question appears to have been reserved by the trial court as not necessary to its judgment, and is therefore not before this Court.[10] *Amici* simply maintain that either the facial overbreadth or the vagueness in application of petitioners' policy *invites* selective enforcement and cannot in any event be deemed a regulation of speech that is "rationally related" to petitioners' objectives of keeping the airport terminal area available for its primary purpose of facilitating passenger air travel. Accordingly, the resolution is unconstitutional however the "public forum" question is decided.

IV. RESPONDENTS' INTENDED SPEECH IS DESERVING OF CONSTITUTIONAL PROTECTION OF THE HIGHEST ORDER.

The parties are agreed that the pamphleteering activity of Jews for Jesus is protected speech under the First Amendment. That this point is not disputed does not mean it should be ignored, for to ignore the importance of the pure speech involved here is to ignore the significance of this case. We start with the simple observation that religious speech is certainly entitled to *no less* protection than any other type of speech. The great cases of this Court upholding the right of free speech have frequently dealt with speech of a religious nature. *See, e.g., Murdock v. Pennsylvania*, 319 U.S. 105 (1943); *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Martin v. City of Struthers*, 319 U.S. 141 (1943), *Schneider v. State*, 308 U.S. 147 (1939). Indeed, the free and unrestricted communication of religious ideas has, since the days of the framing of the Constitution, enjoyed the same high and special status as speech of a political na-

[10] *See supra* note 2, at 6.

ture, reflecting both our nation's commitment to individual rights of conscience and the importance of the pluralism that results from such a commitment and, in turn, helps to preserve it. *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642 (1943). *Murdock*, 319 U.S. at 115 (speaking of "preferred position" of speech and religion under Constitution); THE FEDERALIST No. 51, at 264 (J. Madison) (G. Wills, ed. 1982) ("In a free government the security for civil rights must be the same as that for religious rights. It consists in the one case in the multiplicity of interests, and in the other in the multiplicity of sects.").

It is also important to note that the speech here involves the expression of respondents' religion as well. The *raison d'etre* of Jews for Jesus is evangelism, and of a very distinctive sort. Jews for Jesus' primary religious function is to advance a religious viewpoint within a religious and ethnic minority in this country, and to do so by persuasion and disputation in the traditional quasi-rabbinic method of discussion and reasoned argumentation from the Jewish scriptures. While this case presents no occasion for this Court to explore the outer contours of a free exercise right to preach and evangelize (respondents' rights in this regard are fully protected here by the Speech Clause), this Court has held that religious expression and related aspects of religious practice are entitled in some contexts to protections that go *beyond* those extended to comparable forms of belief as a matter of constitutional law. *See e.g., Thomas v. Review Board*, 450 U.S. 707 (1981); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Murdock*, 319 U.S. at 115.[11]

---

[11] *Amici* note the natural similarity between this Court's free exercise doctrine and its free speech doctrine. State regulation that impinges on these classic liberties of conscience and expression is subjected to heightened judicial scrutiny of both the nature of the state interest being asserted (to defeat *bona fide* free exercise or speech interests, it must be "compelling") and the closeness and precision with which the regulation serves that interest and avoids

The speech involved in this case, the distribution of leaflets as a prelude and invitation to religious discussion, is, to borrow the words of the late Justice Stewart, "an exercise of . . . basic constitutional rights in their most pristine and classic form." *Edwards v. South Carolina*, 372 U.S. 229, 235 (1963). *Amici* ask that the Court give this fact due weight.

CONCLUSION

Accordingly, the judgment of the Court of Appeals for the Ninth Circuit should be affirmed.

Respectfully submitted,

Of Counsel:

FOREST D. MONTGOMERY
NATIONAL ASSOCIATION
OF EVANGELICALS
1430 K Street, N.W.
Washington, D.C. 20005
(202) 628-7911

MICHAEL J. WOODRUFF
Counsel of Record
SAMUEL E. ERICSSON
KIMBERLEE W. COLBY
MICHAEL A. PAULSEN
CENTER FOR LAW &
RELIGIOUS FREEDOM
Post Office Box 1492
Merrifield, Virginia 22116
(703) 560-7314

December 23, 1986

---

unnecessary interference with First Amendment freedoms ("least-restrictive-means"). *Compare Thomas, supra* and *Yoder, supra with United States v. O'Brien*, 391 U.S. 367, 377 (1968) ("[W]e think it clear that a government regulation is sufficiently justified . . . if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."); *and United States v. Albertini*, —— U.S. ——, 53 U.S.L.W. 4844, 4847 (No. 83-1624, June 24, 1985) (quoting *O'Brien* with approval); *Compare Shuttlesworth v. Birmingham*, 394 U.S. 147 (1969) *with Murdock*, 319 U.S. 105. Here, free exercise and free speech doctrines work together to reinforce the importance of the First Amendment activity which petitioners' policy seeks to suppress.

No. 86-104

Supreme Court, U.S.
FILED
DEC 24 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

October Term, 1986

THE BOARD OF AIRPORT COMMISSIONERS OF THE CITY OF LOS ANGELES, et al.,

Petitioners,

v.

JEWS FOR JESUS, INC., et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE RUTHERFORD INSTITUTE, AND THE RUTHERFORD INSTITUTES OF ALABAMA, COLORADO, CONNECTICUT, DELAWARE, FLORIDA, GEORGIA, KENTUCKY, MICHIGAN, MINNESOTA, MONTANA, PENNSYLVANIA, TENNESSEE, TEXAS, VIRGINIA AND WEST VIRGINIA, AMICI CURIAE, IN SUPPORT OF THE RESPONDENTS

James J. Knicely
Counsel of Record
John W. Whitehead
Gary C. Leedes
The Rutherford Institute
9411 Battle Street
Manassas, Virginia 22110
(703) 369-0100

A. Eric Johnston
The Rutherford Institute
of Alabama
P.O. Box 59561
Birmingham, Alabama 35259

Lynn M. Watwood, Jr.
The Rutherford Institute
of Colorado
One Civic Center Plaza -
Suite 340
1560 Broadway Street
Denver, Colorado 80202

Joseph S. Secola
The Rutherford Institute
of Connecticut
122 Broad Street
On the Green
Milford, Connecticut 06460

Alfred J. Lindh
The Rutherford Institute
of Delaware
1 Customs House Square
Wilmington, Delaware 19801

Ira W. Still, III
The Rutherford Institute
of Florida
6198 Laurel Lane
Tamarac, Florida 33319

William P. Hollberg
Wendell R. Bird
The Rutherford Institute
of Georgia
1275 Peachtree Street, N.E.
Altanta, Georgia 30367

John K. Webb
The Rutherford Institute
of Kentucky
8 Ardery Place, Suite 4
Paris, Kentucky 40361

David A. French
The Rutherford Institute
of Michigan
2010 Devolson
Ann Arbor, Michigan 48104

Thomas W. Strahan
The Rutherford Institute
of Minnesota
1313 Fifth Street, S.E.
Minneapolis, Minnesota 55414

J. Douglas Alexander
The Rutherford Institute
of Montana
104 Second Avenue, S.W.
Sidney, Montana 59270

Victor E. Vouga
The Rutherford Institute
of Pennsylvania
234 West Pine Street
Grove City, Pennsylvania 16127

Les Bailey
The Rutherford Institute
of Tennessee
710 East Sullivan Street
Kingsport, Tennessee 37660

W. Charles Bundren
The Rutherford Institute
of Texas
P.O. Box 923
Dallas, Texas 75221

Randall L. Trautwein
The Rutherford Institute
of West Virginia
Morris Building - Suite 200
845 Fourth Avenue
Huntington, West Virginia 25701

Steven W. Graber
The Rutherford Institute
of Virginia
P.O. Drawer GR
Williamsburg, Virginia 23187

Attorneys for Amici Curiae

TABLE OF CONTENTS

Page

Table of Authorities ii

Interest of Amici Curiae 1

Statement of Facts 2

Summary of Argument 2

Argument

I. Petitioners' First Amendment Theory Presents A Threat To Free Speech Generally And Should Be Unequivocally Rejected As Inconsistent With The First Amendment And This Court's Cases Interpreting The First Amendment 5

II. The Central Terminal Area Of Los Angeles International Airport Is A Traditional Public Forum Subject Only To Reasonable Time, Place And Manner Restrictions 11

III. The Central Terminal Area Of Los Angeles International Airport Is A Designated Public Forum In Which Respondents May Not Be Selectively Excluded On The Basis Of The Subject Matter Or Content Of Their Expression 17

IV. The Imprecisely Worded Resolution Fails To Give Persons Seeking Access To The Public Forum Fair Warning About The Kinds Of Expression That Are Permitted, And Owing To Its Incurable Ambiguity, Is Substantially Overbroad And Unconstitutionally Vague 21

Conclusion 23

Table of Authorities

Cases

Page

Adderley v. Florida, 385 U.S. 39 (1966) 15

Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc. 391 U.S. 308 (1968) 6

American Future Systems, Inc. v. Pennsylvania State University, 568 F. Supp. 666 (M.D. Pa. 1983) 11

Cantwell v. Connecticut, 310 U.S. 296 (1940) 7, 24

Carey v. Brown, 447 U.S. 445 (1980) 19, 20, 23

Carreras v. City of Anaheim, 768 F. 2d. 1039 (9th Cir. 1985) 11

Cinevision Corporation v. City of Burbank, 745 F. 2d 560 (9th Cir. 1984) 11, 20

City Council v. Taxpayers for Vincent, 466 U.S. 789 (1984) 3, 8, 23

City of Renton v. Playtime Theatres, Inc., 106 S. Ct. 925 (1986) 20

Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984) 12

Cohen v. California, 403 U.S. 15 (1971) 7

Commonwealth v. Davis, 162 Mass. 510 (1895) 8

Consolidated Edison Co. v. Public Service Commission of New York, 447 U.S. 530 (1980) 19

Cornelius v. NAACP Legal Defense and Educational Fund, Inc., 105 S. Ct. 3439 (1985) 3, 5, 7, 9, 10, 12, 13, 14, 18

Country Hills Christian Church v. Unified School Dist. No. 512, 560 F. Supp. 1215 (D. Kan. 1983) 11

Dallas Association of Community Organizations for Reform v. Dallas County Hospital District, 670 F. 2d 629 (5th Cir. 1982) 11

Davis v. Commonwealth, 167 U.S. 43 (1897) 8

Dombrowski v. Pfister, 380 U.S. 479 (1965) 23

Edwards v. South Carolina, 372 U.S. 229 (1963) 12

Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975) 19

Gooding v. Wilson, 405 U.S. 518 (1972) 22

Grayned v. City of Rockford, 408 U.S. 104 (1972) 4, 16, 17

Greer v. Spock, 424 U.S. 828 (1976) 15

Page

Hague v. CIO, 307 U.S. 496 (1939) 6

Hennessey v. Independent School District No. 4, Lincoln County, 552 P. 2d 1141 (Okla. 1976) 10

Hoffman Estates v. Flipside, Hoffman Estates, 455 U.S. 489 (1982) 22

ISKON v. New Jersey Sports and Exposition Authority, 691 F. 2d 155 (3rd Cir. 1982) 8

Jaffe v. Alexis, 659 F. 2d 1018 (9th Cir. 1981) 11

Jones v. North Carolina Prisoners' Labor Union, 433 U.S. 119 (1977) 14

Knights of KKK v. East Baton Rouge School Board, 578 F. 2d 1122 (5th Cir. 1978) 11

Kolender v. Lawson, 461 U.S. 352 (1983) 22

Lehman v. City of Shaker Heights, 418 U.S. 298 (1974) . 8, 15, 17, 19

Lewis v. City of New Orleans, 415 U.S. 130 (1974) 22

Lovell v. Griffin, 303 U.S. 444 (1938) 22

Madison School District v. Wisconsin Employment Relations Commission, 429 U.S. 167 (1976) 14, 23

Martin v. Struthers, 319 U.S. 141 (1943) 12

Metromedia, Inc. v. San Diego, 453 U.S. 490 (1981) 19

National Socialist White People's Party v. Ringers, 473 F. 2d 1010 (4th Cir. 1973) 10

New York v. Ferber, 458 U.S. 747 (1982) 23

New York City Unemployed and Welfare Council v. Brezenoff, 742 F. 2d 718 (2nd Cir. 1984) 11

Niemotko v. Maryland, 340 U.S. 268 (1951) 20

Perry Education Association v. Perry Local Educators' Association, 460 U.S. 37 (1983) 3, 8, 14, 15, 18

Police Department of Chicago v. Moseley, 408 U.S. 92 (1972) 4, 17, 19, 20, 23

Project Vote v. Ohio Bureau of Employment Services, 578 F. Supp. 7 (S.D. Ohio 1982) 11

PruneYard Shopping Center v. Robins, 447 U.S. 74 (1980) 18

Resnick v. East Brunswick Township Board of Education, 389 A. 2d 944 (N.J. 1978) 10

Saia v. New York City, 334 U.S. 558 (1948) 12

Schneider v. State, 308 U.S. 147 (1939) 3, 8, 12, 15

Page

Shuttlesworth v. Birmingham, 394 U.S. 147 (1969) 5, 22

Smith v. Goguen, 415 U.S. 566 (1974) 5, 7, 22

Southeastern Promotions Ltd. v. Conrad, 420 U.S. 546, 555 (1975) 14, 23

Southside Estates Baptist Church v. Board of Trustees, 115 So. 2d 697 (Fla. 1959) 10

Spence v. Washington, 418 U.S. 405 (1974) 12

Thornhill v. Alabama, 310 U.S. 88 (1940) 5, 12, 22, 23

Tinker v. Des Moines Independent School District, 393 U.S. 503 (1969) 7, 12

U.C. Nuclear Weapons Labs v. Lawrence Livermore Lab., 201 Cal. Rptr. 837 (Cal. App. 1 Dist. 1984) 11

U.S. Southwest Africa/Namibia Trade & Cultural Council v. United States, 708 F. 2d 760 (D.C. Cir. 1983) 8

United States Postal Service v. Council of Greenburgh Civic Association, 453 U.S. 114 (1981) 14

Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620 (1980) 12

Whitney v. California, 274 U.S. 357 (1927) 7

Widmar v. Vincent, 454 U.S. 263 (1981) 14, 23

Other Sources

Brief for the Petitioners 16

Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 Yale L.J. 920 (1973) 6

Petition for Writ of Certiorari 2, 6, 8, 16

Resolution No. 13787 ..... 4, 9, 17, 18, 21 23, 24

G. Stone, L. Seidman, C. Sunstein and M. Tushnet, *Constitutional Law* (1986) 6

IN THE

Supreme Court of the United States

October Term, 1986

No. 86-104

THE BOARD OF AIRPORT COMMISSIONERS OF THE CITY OF LOS ANGELES, et al.,

Petitioners,

v.

JEWS FOR JESUS, INC., et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE RUTHERFORD INSTITUTE, AND THE RUTHERFORD INSTITUTES OF ALABAMA, COLORADO, CONNECTICUT, DELAWARE, FLORIDA, GEORGIA, KENTUCKY, MICHIGAN, MINNESOTA, MONTANA, PENNSYLVANIA, TENNESSEE, TEXAS, VIRGINIA AND WEST VIRGINIA, AMICI CURIAE, IN SUPPORT OF THE RESPONDENTS

INTEREST OF AMICI CURIAE*

This case presents important issues concerning the freedom of speech for all Americans. The American tradition of free and open discourse in public places has contributed greatly to the success of our democracy. The Petitioners would drastically restrict this freedom. Their First Amendment theory would permit legislators to circumscribe severely speech activities in virtually all public places save parks, streets and sidewalks. This is not only inconsistent with American tradition and this Court's First Amendment cases, but it also poses a grave threat to freedom of

*Counsel of record to the parties in this case have consented to the filing of this brief and letters of consent have been filed with the Clerk pursuant to Rule 36.

speech as we now know it in this country. The Rutherford Institute is opposed to this attempt to restrict free speech on generally accessible public property and believes that the decision of the Court of Appeals should be forcefully affirmed as fully consistent with the mandate of the First Amendment.

Amici Curiae are non-profit religious corporations named for Samuel Rutherford, a 17th-century Scottish minister and rector at St. Andrew's University. With state chapters in Alabama, Colorado, Connecticut, Delaware, Florida, Georgia, Kentucky, Michigan, Minnesota, Montana, Pennsylvania, Tennessee, Texas, Virginia and West Virginia and its national office in Manassas, Virginia, the Rutherford Institute undertakes to assist litigants and to participate in significant cases relating to First Amendment freedoms. Counsel for *Amici Curiae* have specialized in litigation in state and federal courts and have participated as counsel for *amici curiae* in previous cases before this Court. The Rutherford Institute believes the expertise of its counsel will be of assistance to the Court in this case.

Statement Of Facts

The facts have been stipulated by the parties and are found in Appendix 1 to the Petitioners' Petition for a Writ of Certiorari filed in this Court.

Summary of Argument

The theory advanced by the Petitioners in this case, if sustained, will inevitably result in the reduction of countless numbers of public forums in this country and will severely restrict the traditional marketplace of ideas. This is so because under the Petitioners' theory, legislative and other governmental agencies would, in effect, be permitted to restrict or regulate speech on virtually *all* public property, except parks, streets and sidewalks, in order to accomplish governmental objectives. The problem with this analysis is that it ignores five decades of this Court's decisions concerning the traditional public forum, as well as hard facts about the speech in question, the nature and characteristics of the forum involved and the justifica-

tions for exclusion of citizens from public property that, in many instances, as in the present case, is free, open and generally unhindered by governmental interference.

The Petitioners' argument is based principally upon dicta from three of this Court's recent *non-public* forum cases, *Cornelius v. NAACP Legal Defense and Education Fund, Inc.* 105 S. Ct. 3439 (1985) (Combined Federal Campaign is a non-public forum), *City Council v. Taxpayers for Vincent,* 466 U.S. 789 (1984) (public utility poles are non-public forum), and *Perry Education Association v. Perry Local Educators' Association,* 460 U.S. 37 (1983) (public school mail system is a non-public forum). Seizing upon language from these opinions, the Petitioners deduce that public property becomes a traditional public forum—and therefore open for speech activities—only if its principal purpose is the free exchange of ideas. Because the principal purpose of an airport is air transportation and aid to the traveling public, and not the free exchange of ideas, it follows that it is not a traditional public forum. Government may therefore restrict or regulate speech activities in such a forum, or so the argument goes.

The defects in this reasoning are obvious from the very nature and character of the forum in question. The Central Terminal Area of Los Angeles International Airport is open to the general public on a twenty-four-hour basis. Like parks, streets and sidewalks, the walkways, lobbies and meeting areas of the Central Terminal Area are municipal thoroughfares where groups of people gather, congregate and traverse, places which are "natural and proper" for all kinds of protected expression. *Schneider v. State,* 308 U.S. 147 (1939). This Court should take judicial notice of the fact that countless political and other rallies have been staged in airports and other transportation terminals. Sports teams, public officials, public figures, world-renowned ballet companies, symphonies and rock groups, and even fugitives—you name it—have been variously welcomed, interviewed and/or greeted at airports, whether by mass demonstrations, high school bands, cheerleaders, fans, news broadcasters or members of the general public. Even

the ordinary, predominant and diverse expression of individual travelers, spectators or greeters is no less similar to or protected than the expression in which the Respondents have sought to engage. It is clear, therefore, that the general nature of the property in this case is not and cannot be described as dedicated exclusively to air commerce and navigation. Rather, the nature of the property and its compatibility with the types of expressive activities carried on there suggest that the proper constitutional status of the forum is in the nature of a traditional public forum. *Police Department of Chicago v. Moseley,* 408 U.S. 92 (1972); *Grayned v. City of Rockford,* 408 U.S. 104 (1972).

The facts of this case, in any event, evidence a clear governmental intent to establish a public forum. On the one hand, Resolution No. 13787 bans "First Amendment activities," but on the other, it gives the government the right, in effect and practice, to advance speech that in its opinion promotes air commerce and navigation. Government becomes the arbiter of what topics and what types of speech will be permitted in the airport. Thus, commercial advertising, sale and distribution of printed matter, T-shirt and clothing slogans, broadcast journalism, certain types of free literature distribution, certain types of displays, the Christian Science reading room, and other expressive activities are permitted by the Petitioners.

It is axiomatic, and has been for decades under this Court's public forum cases, that government "may not select which issues are worth discussing or debating in public facilities....Once a forum is opened up to assembly and speaking by some groups, government may not prohibit others from assembly or speaking on the basis of what they intend to say." *Police Department of Chicago v. Moseley,* 408 U.S. 92, 96 (1972). Any distinctions drawn with regard to content or subject matter must be carefully tailored to meet the asserted governmental objectives. The distinctions drawn by the policy in this case are highly subjective, overbroad, and suppress "undesirable" speech. As such, the policy is unconstitutional.

The policy also fails to give fair warning about the kinds of expression that are permitted, and, owing to its incurable ambiguity, is substantially overbroad and unconstitutionally vague. A demonstration by air traffic controllers in the Central Terminal Area about air traffic safety would ostensibly promote air commerce and navigation—and yet it would also appear to be banned. An offer of prayer to passengers facing flight in difficult weather conditions would constitute aid to the traveling public. And yet, this too would appear to be banned. In short, the policy prohibits a broad range of protected expressive conduct. Moreover, it is not clear what is and what is not permitted, leaving the public in a quandry and permitting officials to pursue their personal predilections with respect to what speech affects air commerce and navigation, and thus what will or will not be permitted speech. *Smith v. Goguen,* 415 U.S. 566, 575 (1974); *Thornhill v. Alabama,* 310 U.S. 88 (1940); *Shuttlesworth v. Birmingham,* 394 U.S. 147 (1969). For these reasons, the policy implemented by the Resolution chills the exercise of First Amendment rights because of its overbreadth and vagueness.

ARGUMENT

I.

Petitioners' First Amendment Theory Presents A Threat To Free Speech Generally And Should Be Unequivocally Rejected As Inconsistent With The First Amendment And This Court's Cases Interpreting The First Amendment.

The overriding issue in this case is, plainly and simply, how free will speech be in this country. Petitioners have seized upon language in this Court's recent opinion in *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.,* 105 S. Ct. 3439 (1985), as grounds to impose "speechless" zones on otherwise generally accessible public property. The Petitioners argue that unless a par-

ticular public property has as its "principle [sic] purpose"[1] the free exchange of ideas, such property is not a traditional public forum and speech thereon may be restricted and/or otherwise regulated by legislative fiat. Applied to the facts of this case, the Petitioners' theory holds that because airport terminal facilities have as their "principle [sic] purpose the promotion of air transportation and aid to the traveling public"[2] and not the free exchange of ideas, they are not a traditional public forum.

Petitioners' argument is delusively simple. "It mistakes a definition for a syllogism."[3] Carried to its rational end, speech on virtually all publicly owned property could be eliminated by legislative act, save parks, streets and sidewalks. Indeed, even the latter would have difficulty surviving Petitioners' test since their "principal purpose" is to facilitate recreation and/or vehicular or pedestrian traffic. Parks, streets and sidewalks are rescued only by the explicit language of this Court's precedents ("the titles of streets and parks...have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions"[4]).

Petitioners' theory is not only mistaken, but it also ignores the values inherent in the First Amendment: (1) the idea that men and women are free to express their thoughts in order to enhance their personal growth and self-realization, (2) the concept of a free marketplace of ideas, (3) the safety-valve theory, and (4) the idea that our Founders did not exalt order at the cost of fundamental rights. For a scholarly summation of the values underlying the First Amendment, *see* G. Stone, L. Seidman, C. Sunstein and M. Tushnet, *Constitutional Law,* 931-937 (1986); *see also*

---

[1]*See* Petitioners' Petition for Writ of Certiorari at 8.

[2]*Id.* at 9.

[3]The words are Dean Ely's used in another context. *See* Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade,* 82 Yale L.J. 920, 924 (1973).

[4]*Hague v. CIO,* 370 U.S. 496, 515 (1939). *See also Schneider v. State,* 308 U.S. 147, 163 (1939); *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.,* 391 U.S. 308, 315 (1968).

Whitney v. California, 274 U.S. 357, 375-377 (1927) (Brandeis, J. concurring).

The likely result of Petitioners' novel constitutional theory is a tragic and enormous reduction of countless public forums that have been traditionally used by, among others, the holders of unpopular, disturbing or nonconforming viewpoints. The prevailing consensus has always been uncomfortable with controversial speech, be it religious, political or social. Consider, for example, the facts in *Cantwell v. Connecticut,* 310 U.S. 296 (1940) (provocative religious speech in Catholic neighborhood), or *Tinker v. Des Moines Independent School District,* 393 U.S. 503 (1969) (Vietnam protest in public school setting), or *Cohen v. California,* 403 U.S. 15 (1971) ("F__CK the Draft" protest sewn on jacket worn in public court house) or *Smith v. Goguen,* 415 U.S. 566 (1974) (American flag sewn on seat of trousers). Given the proclivity of legislative and bureaucratic agencies to reflect conventional or prevailing views, the creation of "speechless" zones would be too tempting to officials who prefer, for reasons often unknown, to avoid any confrontation with unpopular, disturbing, or nonconforming viewpoints that are inconvenient or unpleasant to accommodate.

Not only will the inevitable reduction of numerous public forums restrict the traditional marketplace of ideas, but the wholesale rollback will also disproportionately burden speakers and groups lacking the money, popularity or charisma necessary to command attention in the few remaining forums or secure coverage by the media. It follows that Petitioners' denial of ample access for speakers attempting to reach the traveling public may even encourage activities that are potentially more disruptive in airports, such as civil disobedience, particularly over pressing issues of the day. It is well to recall Brandeis' admonition that "[t]hose who won our independence" knew that the "path of safety" lies in free discussion. *Whitney v. California* 274 U.S. at 375 (Brandeis, J. concurring).

Petitioners' theory is grounded largely in dicta contained in the *Cornelius* majority opinion, echoing similar dicta

from two prior cases, *City Council v. Taxpayers for Vincent,* 466 U.S. 789 (1984) and *Perry Education Association v. Perry Local Educators' Association,* 460 U.S. 37 (1983). *Stare decisis* takes on a distorted meaning when the Petitioners, who ironically accuse the Court of Appeals of disregarding "the essential holdings of this Court,"[5] choose to rely primarily upon three cases which involved forums that are a far cry from traditional speech in a traditional public forum—i.e., the Combined Federal Campaign, utility poles and a school mail system. This Court should, therefore, categorically reject Petitioners' constitutional theory, which—applying dicta from cases with significantly different facts—constructs a fictional wonderland where constitutional rights are sacrificed for fine legal distinctions that bear little, if any, relationship to reality.[6]

No doubt "speechless" zones may be created on certain government property with greatly restricted public access, such as jails, mail systems or military bases. However, the

---

[5]See Petition for Writ of Certiorari at 7.

[6]As Judge Arlin Adams astutely observed in a public forum case involving a public stadium:

> I am concerned that an analysis which relies too heavily on whether an area, such as a shopping center or sports complex, has traditionally been regarded as a public forum fails to come to grips with the fact that legal concepts need to evolve to reflect underlying social realities.

ISKON v. New Jersey Sports and Exposition Authority, 691 F. 2d 155 (3rd Cir. 1982) (Statement of Circuit Judge Adams sur denial of petition for rehearing). *Compare, Lehman v. City of Shaker Heights,* 418 U.S. 298 (1974) *with U.S. Southwest Africa/Namibia Trade & Cultural Council v. United States,* 708 F. 2d 760 (D.C. Cir. 1983).

The three recent cases cited by Petitioners were not intended by this Court as a retreat to Justice Holmes' anachronistic view of the public forum that "the right to absolutely exclude all right to use [public property] necessarily includes the authority to determine under what circumstances such use may be availed of, as the greater power contains the lesser." *Davis v. Commonwealth,* 167 U.S. 43, 48 (1897), *affirming Commonwealth v. Davis,* 162 Mass. 510 (1895). That view has not survived this Court's determination that certain places are "natural and proper places for the dissemination of information and opinion." *Schneider v. State,* 308 U.S. 147, 163 (1939).

Petitioners read *Cornelius* to permit *any* governmental agency to legislate the scope of speech activity on virtually *any* public property even though the general public has access to and uses the property on a free and unrestricted basis. The Petitioners' own policy illustrates the inherent unconstitutionality of such legislation. On the one hand, Petitioners have resolved that "the Central Terminal Area at Los Angeles International Airport is not open for First Amendment activities by any individual and/or entity." See Resolution No. 13787. On the other hand, they have resolved that the Central Terminal Area "is only to be used for the promotion and accommodation of air commerce and air navigation or uses incidental thereto." *Id.*

Although Resolution No. 13787 ostensibly imposes an absolute ban on all "First Amendment activities," the exception it carves out, in the name of promoting air commerce and air navigation, permits the Petitioners to pick and select among types of speech of which they approve and sanction. Thus, the Petitioners allow commercial advertising, T-shirt and clothing slogans, literature distribution at "Olympic Family" information booths, broadcast speech, displays on international trade of plants and animals, the Christian Science reading room, printed literature for sale, children's artwork and the limitless other kinds of spontaneous speech activities—not unlike that engaged in by the Respondents—that occur in a public place with unrestricted access. This constitutional shell game allows government to approve speech in furtherance of its objectives while engaging in the fiction of imposing a "ban" on "First Amendment activities" of which it does not approve, a curious bit of "double speak" that should not be countenanced or sanctioned by this Court.

No government should be the arbiter of what is desirable or acceptable speech on generally used, open and readily accessible public property. Unless governmental power in such areas is narrowly limited to the advancement of especially important state objectives in a manner that constitutes the least restrictive infringement of First Amendment rights, the door is wide open for censorship. Free speech in facilities open and accessible to the general

public ought not to be redefined in accordance with the majority's view of what messages are worthy, otherwise making the First Amendment a virtual nullity. Surely, this was not the intended result of the Court's reasoning in *Cornelius.*

The issue presented in this case is not novel or wanting in precedent. Indeed, it has been presented numerous times and thoroughly considered and decided by various lower Federal and State courts. Well nigh universally, these courts have refused to uphold restrictions of the nature sought to be imposed by Petitioners. This well-established and well-considered line of precedents should not be arrogantly disregarded—as the Petitioners have suggested—as "out-dated and often times incorrect lines of case authority,"[7] but instead should be accorded the respect and weight that are due the cumulative wisdom of decades of litigation.

In virtually all of these lower court decisions, annoyance and inconvenience, or speculation about the effect of free speech on governmental efficiency or revenues have uniformly been rejected as justifications for restricting free speech activities where the governmental facilities were readily accessible to and used by the general public. These holdings by the Court of Appeals and other lower Federal and State courts represent an application of public forum principles that is more sensitive to First Amendment values than that advanced by Petitioners.

In addition to the 16 cases cited in the Respondents' Brief in Opposition to the Petition for a Writ of Certiorari, 14 other cases which generally uphold the line of reasoning of the Court of Appeals in other contexts are cited below for reference: *Southside Estates Baptist Church v. Board of Trustees,* 115 So. 2d 697 (Fla. 1959) (religious use of public school facilities); *National Socialist White People's Party v. Ringers,* 473 F. 2d 1010 (4th Cir. 1973) (racist, anti-semitic group's use of public school facilities); *Hennessey v. Independent School District No. 4, Lincoln County,* 552 P. 2d 1141 (Okla. 1976) (PTA use of public school facilities); *Resnick v. East Brunswick Town-*

[7]See Petition for Writ of Certiorari at 6.

ship Board of Education, 389 A. 2d 944 (N.J. 1978) (church use of public school facilities); *Knights of KKK v. East Baton Rouge School Board,* 578 F. 2d 1122 (5th Cir. 1978) (KKK use of public school facilities); *Jaffe v. Alexis,* 659 F. 2d 1018, (9th Cir. 1981) (Krishna speech and solicitation at California DMV office); *Dallas Association of Community Organizations for Reform v. Dallas County Hospital District,* 670 F. 2d 629 (5th Cir. 1982) (literature distribution in public hospital); *Project Vote v. Ohio Bureau of Employment Services,* 578 F. Supp. 7 (S.D. Ohio 1982) (promotion of voter registration at state unemployment office); *American Future Systems, Inc. v. Pennsylvania State University,* 568 F. Supp. 666 (M.D. Pa. 1983) (solicitation in state university student dormitories); *Country Hills Christian Church v. Unified School Dist. No. 512,* 560 F. Supp. 1215 (D. Kan. 1983) (use of public school facilities by church); *New York City Unemployed and Welfare Council v. Brezenoff,* 742 F. 2d 718 (2nd Cir. 1984) (solicitation of membership by welfare rights organization in public welfare office); *U.C. Nuclear Weapons Labs v. Lawrence Livermore Lab.,* 201 Cal. Rptr. 837 (Cal. App. 1 Dist. 1984) (literature display and auditorium access in government nuclear weapons lab visitor center); *Cinevision Corporation v. City of Burbank,* 745 F. 2d 560 (9th Cir. 1984) (access to municipally owned amphitheatre); and *Carreras v. City of Anaheim,* 768 F. 2d 1039 (9th Cir. 1985) (solicitation at city stadium). The weight of reasoning contained in the 16 cases cited by the Respondents and the 14 cases cited above should be accorded proper respect in this Court's consideration of the present case.

II.

The Central Terminal Area Of Los Angeles International Airport Is A Traditional Public Forum Subject Only To Reasonable Time, Place And Manner Restrictions.

As previously stated, the most recent decision of this Court with respect to the "public forum" doctrine is

BEST AVA

Cornelius v. NAACP Legal Defense and Educational Fund, Inc., 105 S. Ct. 3439 (1985), holding that the Combined Federal Campaign constituted a "non-public"—as opposed to "traditional" or "limited"—public forum. Although the nature of the "forum" in *Cornelius* was drastically and significantly different from the forum in this case, *Cornelius* does set forth a framework for analysis in its summary of public forum principles this Court has applied in such cases. The holding in *Cornelius* was based upon an analysis of several factors: (1) whether the speech in question was protected speech, (2) the nature of the forum and its public or non-public characteristics and (3) the justification for exclusion from the relevant forum viewed against the requisite constitutional standard applicable to that type of forum. *Id.* at 3446-3447.

A. Nature Of The Speech

The initial inquiry is to determine whether the speech in question is protected speech. There can be little question that the Respondents' speech activities are protected by the First Amendment. The Petitioners do not dispute the assertion that such activities constitute protected speech. In any event, this Court's cases on picketing,[8] leafleting,[9] and solicitation,[10] as well as cases governing speech by conduct[11] in public settings, are too numerous and extensive to deny that speaking and leafleting in a public place "would reasonably be understood by the viewer as communicative," *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 294 (1984), and, therefore, speech protected by the First Amendment.

---

[8] *Thornhill v. Alabama*, 310 U.S. 88 (1940); *Edwards v. South Carolina*, 372 U.S. 229 (1963).

[9] *Schneider v. State*, 308 U.S. 147 (1939); *Martin v. Struthers*, 319 U.S. 141 (1943); *Saia v. New York City*, 334 U.S. 558 (1948).

[10] *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980); *Cornelius*, 105 S. Ct. 3439 (1985).

[11] *Spence v. Washington*, 418 U.S. 405 (1974); *Tinker v. Des Moines Independent School District*, 393 U.S. 503 (1969).

ILABLE COPY

B. The Relevant Forum

There being protected speech in this case, it becomes necessary to determine the relevant forum. *Cornelius* determined that "a speaker must seek access to public property or to private property dedicated to public use to evoke First Amendment concerns...." *Cornelius,* 105 S. Ct. at 3449. Moreover, this Court, in *Cornelius,* recognized that "[w]hen speakers seek general access to public property, the forum encompasses that property." *Id.*

In this case, Respondents sought to speak and distribute literature inside the Central Terminal Area in areas and places that were open to the general public without restriction or limitation. Importantly, they did *not* seek access for speech purposes in rented spaces, or in office areas or in airline employee lounges or other restricted spaces, or in restaurants, stores or shops, or in restricted operational areas or other forums on the property constituting the Los Angeles International Airport. Rather, they sought access only to the walkways and open spaces of the Central Terminal Area—areas that were free and open to the public with little or no restriction and characterized by open and free expression. The relevant forum in this case—"tailored" to "the perimeters of a forum within the confines of government property"—encompasses only the free and open areas of the Central Terminal Area. *Cornelius,* 105 S. Ct. at 3449.

C. The Nature Of The Forum

The next inquiry is to determine the nature and characteristics of the forum. If the Central Terminal Area is a "traditional" public forum, then exclusion of Respondents on the basis of the subject matter of their speech can occur "only when the exclusion is necessary to serve a compelling state interest and the exclusion is narrowly drawn to achieve that interest." *Cornelius,* 105 S. Ct. at 3448. If the Central Terminal Area is a "designated" public forum, i.e., a non-traditional forum opened by intentional governmental policy, any exclusion is

governed by the same standard as the traditional public forum. *Perry Education Association v. Perry Local Educators' Association,* 460 U.S. 37, 46 (1983). Finally, if the Central Terminal Area is a non-public forum, access "can be restricted as long as the restrictions are 'reasonable' and [are] not an effort to suppress expression merely because public officials oppose the speaker's views."[12] *Cornelius,* 105 S. Ct. at 3448, *citing Perry,* 460 U.S. at 46.

In its review of the relevant precedents, this Court in *Cornelius* viewed *Widmar v. Vincent,* 454 U.S. 263 (1981) (university campus), *Madison School District v. Wisconsin Employment Relations Commission,* 429 U.S. 167 (1976) (school board meeting) and *Southeastern Promotions Ltd. v. Conrad,* 420 U.S. 546, 555 (1975) (municipal auditorium) as cases having "many characteristics of a traditional public forum" and evidencing a clear government intent to create a public forum, in part from the nature of the meetings involved and the design, dedication and actual use of the property involved. *Cornelius,* 105 S. Ct. at 3449-3450. Per contra, the *Cornelius* majority viewed *United States Postal Service v. Council of Greenburgh Civic Association,* 453 U.S. 114 (1981) (mail system), *Jones v. North Carolina Prisoners' Labor Union,* 433

---

[12] *Perry,* of course, expounded a three-tier public forum analysis drawn from the Court's prior decisions. These include: (1) streets, parks, sidewalks and the like that are traditionally public forums; (2) "place(s) or channel(s) of communication" created by government designation for assembly and speech, for use by certain speakers or for the discussion of certain subjects and (3) non-public forums, created by government, but not open except pursuant to reasonable government policies. *See Cornelius,* 105 S. Ct. at 3449.

Perry implicitly and *Cornelius* explicitly suggest that the second-tier "designated" or "limited" public forum arises *not* from government inaction or permitting limited discourse, "but only by [government] intentionally opening a non-traditional forum for public discourse." *Id.; Perry,* 460 U.S. at 47. Thus, *Cornelius* appears to go beyond *Perry* to hold that explicit government policy and practice are paramount in ascertaining whether government intends to create a "designated" public forum. Nevertheless, "the nature of the property" and its "compatibility with expressive activity" are also particularly relevant in discerning the government's intent to create a forum. *Cornelius,* 105 S. Ct. at 3449.

U.S. 119 (1977) (jail), *Lehman v. City of Shaker Heights,* 418 U.S. 298 (1974) (bus advertising space), *Greer v. Spock,* 424 U.S. 828 (1976) (military base), *Adderley v. Florida,* 385 U.S. 39 (1966) (jail) and, indeed, *Perry* itself (mail system), as cases with non-public forums resulting from a government policy denying general public access, requiring permission for use and seeking to avoid disruptive effects that might arise if general access were given.

Applying these principles to the present case, it should first be observed that an airport terminal with a free flow of traffic and robust and varied expression, both oral and written, is more akin to a park, street or sidewalk than even a university campus, school board meeting or municipal auditorium, let alone the Combined Federal Campaign, an amorphous school mail system, a jail, a military base or advertising space on city transit buses. Like public streets and sidewalks, the Central Terminal Area walkways, lobbies and meeting places are areas where large groups of people gather, congregate and traverse, places which, in this Court's words, are "natural or proper" for all kinds of protected expressive activities, including the dissemination of information and opinion. *Schneider v. State,* 308 U.S. 147, 163 (1939).

Likewise, speech in the Central Terminal Area is traditional speech activity—varied in its manifestations, soft, loud, vibrant or robust, but, in any event, generally uninhibited. Except there were government censorship of certain speech in the Central Terminal Area, it is difficult to imagine a setting in which more diverse speech could be found. Indeed, it is legitimate to ask whether transportation terminals and other similar public facilities open to the general public on a twenty-four-hour basis are not, in the context of modern society and the technological revolution, in many respects the sidewalks and parks of the modern era—i.e., functionally equivalent places where crowds and people congregate and traverse and carry on all sorts of dialogue relating not only to the setting or the events being held, but to issues of the day as well.

The Petitioners argue that "[a]n airport does not have as a principal purpose, a long tradition of or a dedication

to public assembly and debate." *See* Brief for the Petitioners at 15. This is simply not true. This Court can take judicial notice that countless political and other rallies have been staged at airports and other transportation terminals. Sports teams, public officials, public figures, world-renowned ballet companies and symphonies, rock groups, fugitives—you name it—have been variously welcomed, interviewed and/or greeted at airports, whether by mass demonstrations, high school bands, cheerleaders, fans, news broadcasters or members of the general public. These speech and assembly uses and activities are simply part of the territory. As such, public transportation terminals are no less traditionally dedicated to assembly and debate than are streets and sidewalks. By their very nature, their purpose is not—and, indeed, cannot be—exclusively transportation or aid to the traveling public.

Petitioners also raise the spectre that, if the Respondents prevail, *every* government building will become a traditional public forum, with government never able to restrict facilities to their intended purposes. *See* Brief for the Petitioners at 15, 22 and 26. Experience alone shows that this parade of horribles is not true. Governments do restrict—and, indeed, the Petitioners have restricted—*access* to their property. For example, the Stipulation of Facts in this case states that one part of the Los Angeles International Airport is "the restricted or 'field side' area containing runways, taxiways, airline maintenance and cargo facilities, aircraft loading ramps and various aircraft service facilities...." *See* Stipulation of Facts, paragraph 4, Appendix 1 to Petition for Writ of Certiorari. There is no contest—nor is there any doubt—that the Petitioners can and do restrict access to these facilities. Likewise, governments everywhere can and do restrict access to a legion of government property—including all or a portion of hallways in the building housing this Court and countless other government buildings in this country. This restricted access is not only for security reasons, but also because First Amendment expression in such areas "is basically incompatible with the normal activity of [those] particular places at [those] particular time[s]." *Grayned v. City of*

Rockford, 408 U.S. 104, 116 (1972). Moreover, unlike the present case, access to such property is restricted without regard to the content or subject matter of the speech in question. In other words, public facilities would not become "Hyde Parks open to every would-be pamphleteer and politician" (*Lehman v. Shaker Heights,* 418 U.S. 298, 304 (1974)) unless there was a proper determination that free speech activities were compatible with the nature of the forum and there was no justification for exclusion.

The normal activity of the Central Terminal Area is, of course, to obtain transit by air, but the size, diversity and freedom of the forum by definition produce an amalgam of expression. This includes not only the speech activities permitted by the Petitioners, but also the spontaneous, demonstrative, interactive, spectative, vigorous and exuberant speech of terminal users, all unhindered by government interference (except for the proposed selective enforcement of Petitioners). The nature of the government property and its compatibility with the types of expressive activities carried on there suggest, therefore, as the Court of Appeals concluded, that the proper constitutional status of the forum is in the nature of a traditional public forum. *Police Department of Chicago v. Moseley,* 408 U.S. 92 (1972); *Grayned v. City of Rockford,* 408 U.S. 104, 116 (1972).

III.

The Central Terminal Area Of Los Angeles International Airport Is A Designated Public Forum In Which Respondents May Not Be Selectively Excluded On The Basis Of The Subject Matter Or Content Of Their Expression.

Whether or not the Central Terminal Area is a traditional public forum, the facts in this case, in any event, evidence a clear government intent to establish a public forum. As previously stated, although Resolution No. 13787 ostensibly bans all First Amendment activities, it nevertheless

permits a wide range of activities that promote and accommodate air commerce and air navigation. These latter activities apparently include, by Petitioners' practice, commercial advertising, T-shirt and clothing slogans, broadcast journalism, certain types of literature distribution, certain types of displays, the Christian Science reading room, printed literature for sale and other expressive activity which, *in the opinion of the Petitioners,* purportedly advance air commerce and navigation. Moreover, but for Petitioners' newly adopted policy, the custom in the Central Terminal Area for over 10 years has been to permit virtually *all* First Amendment activities. In this context, where the state has expressly and intentionally—by policy and practice—opened up a forum, it cannot at the same time exclude certain types of speech based on content or subject matter.[13]

Clearly, the large number of exceptions to the ban imposed by Resolution No. 13787 are content based. The official decision as to whether a message accommodates air navigation and commerce or aid to the traveling public depends ultimately on an evaluation of the message's content and effect on "commerce." It is incredible to suppose that the censorship practiced at the Los Angeles International Airport is unrelated to the suppression of ideas or that it is ideologically neutral. Indeed, countless sets of messages are proscribed based on an evaluation of whether they advance a topic having some tenuous connection with traffic congestion, intrusiveness or some other purpose articulated as a justification for the Petitioners' restriction on protected speech.

---

[13]Dicta in *Perry* and *Cornelius* may be read to allow government to restrict speech in designated public forums that is dissimilar in kind from speech designated by government as permissible. Assuming the point arguendo, the religious speech of Respondents in this case is sufficiently similar to the religious message of the Christian Science reading room as to prevent any exclusion of Respondents' speech. Moreover, First Amendment distinctions should not be made to depend upon the financial ability of a speaker to rent space in the designated public forum. Finally, if Petitioners are implying that airport officials have the same rights as private property owners to restrict speech on their property, this Court has already held that owners of private property in California do not have the constitutional right to suppress the dissemination of pamphlets. *See PruneYard Shopping Center v. Robins,* 447 U.S. 74 (1980).

The First Amendment's hostility to content-based regulation extends to bans that prohibit "public discussion of an entire topic." *Consolidated Edison Co. v. Public Service Commission of New York,* 447 U.S. 530, 537 (1980). Content-based discrimination is not rendered "any less odious" because it distinguishes "among entire classes of ideas, rather than among points of view within a particular class...." *Lehman v. City of Shaker Heights,* 418 U.S. 298, 316 (1974) (Brennan, J., dissenting). Moreover, content-based bans that prefer commercial speech over political, religious or other expression cannot survive judicial scrutiny under the principles of *Metromedia, Inc. v. San Diego,* 453 U.S. 490 (1981) (A content-based distinction that affords greater access to commercial speech over non-commercial speech is an impermissible distinction). For a content-based restriction to survive strict judicial scrutiny, the government has a strong burden of persuasion to show that its restriction is "precisely tailored," neither over-inclusive nor under-inclusive, and that a no less discriminatory classification is practicable for furthering its bona fide compelling purposes. *See Police Department of Chicago v. Moseley,* 408 U.S 92 (1972); *Carey v. Brown,* 447 U.S. 455 (1980); *Erznoznik v. City of Jacksonville,* 422 U.S. 205 (1975).

The present ban has been justified on several grounds: (1) congestion and impeded flow of passenger traffic, (2) incompatibility with the character and function of the Central Terminal Area and (3) unwanted and disruptive intrusions caused by the speech in question. None of these grounds supports an absolute and virtually total ban on so many First Amendment activities, particularly when the Petitioners permit similar activities which in fact cause or contribute to the same problems. For example, television broadcasts in the Central Terminal Area generate as much or more congestion than prosyletizing ever would. The Christian Science reading room is no less compatible with the character and function of the Central Terminal Area than a sole individual distributing written leaflets reflecting other religious views. Moreover, a person who is a

witness to his faith is no more disruptive or intrusive than an off-color commercial advertisement or a loud, raucous crowd welcoming home an athletic team, or an offensive passenger boasting rashly of a football victory. And yet, the Petitioners would somehow censor the former because it is, in their opinion, "non-airport related speech," whatever that means.

The restrictions in this case are thus not precisely tailored. They are over-inclusive and under-inclusive and discriminate unevenly between governmentally favored and non-favored expression. *Police Department of Chicago v. Moseley,* 408 U.S. 92 (1972); *Carey v. Brown,* 447 U.S. 455 (1980); see also *Niemotko v. Maryland,* 340 U.S. 268 (1951) (Denial of park access to Jehovah's Witnesses but no other fraternal organizations violates freedom of speech guarantee). Generally "[s]elective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone." *Police Department of Chicago v. Moseley,* 408 U.S. at 96.

This Court has only recently reaffirmed "the fundamental principle that underlies [its] concern about 'content-based' speech regulations" in *City of Renton v. Playtime Theatres, Inc.* 106 S. Ct. 925, 929 (1986), indicating that "government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views." *Police Department of Chicago v. Moseley,* 408 U.S. at 95-96. In sum, "any content-based regulation that is justified by a compelling state interest also must be narrowly drawn and must constitute the *least* restrictive means of furthering the governmental interest." *Cinevision Corporation v. City of Burbank,* 745 F. 2d 560, 571 (9th Cir. 1984) *cert. den.* ____ U.S. ____, 105 S. Ct. 2115 (1985) (emphasis added). The Petitioners' policy must, therefore, fail as an impermissible content control. As this Court stated in *Police Department of Chicago v. Moseley,* 408 U.S. 92, 96 (1972):

> Necessarily, then, under the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to

> people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views. And it may not select which issues are worth discussing or debating in public facilities. There is an "equality of status in the field of ideas," and government must afford all points of view an equal opportunity to be heard. Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say. Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone.

The case law is clear that government policy restricting speech on the basis of content or subject matter must be evenhanded. Any distinctions drawn with regard to content or subject matter must be carefully tailored to meet the asserted governmental objective, which must also serve a legitimate public interest. The distinctions drawn by the policy in this case are highly subjective, overbroad and aimed at suppressing "controversial" speech. As such, the policy is unconstitutional.

IV.

The Imprecisely Worded Resolution Fails To Give Persons Seeking Access To The Public Forum Fair Warning About The Kinds Of Expression That Are Permitted, And Owing To Its Incurable Ambiguity, Is Substantially Overbroad And Unconstitutionally Vague.

The Resolution in question is void for vagueness because it does not give fair warning as to what expression will be permitted. For example, a demonstration or leafleting by air traffic controllers in the Central Terminal Area about air traffic safety would ostensibly promote air commerce and navigation and would be compatible with

the character and function of the Central Terminal Area; so too, would an offer by the Respondents of prayer with passengers facing flight in difficult weather conditions. Likewise, the offer of free literature to read during flight would promote air commerce and navigation as much as the commercial sale of such literature. And yet, all of these activities are obstensibly banned.

In First Amendment cases, the void for vagueness standard is unusually strict. *Hoffman Estates v. Flipside, Hoffman Estates,* 455 U.S. 489, 499 (1982). ("If...the law interferes with the right of free speech or association, a more stringent vagueness test should apply.") A statute can be unconstitutionally vague on its face even if it is not vague in all of its permissible applications, *Kolender v. Lawson,* 461 U.S. 352, 358-359 n. 8 (1983), especially when, as in the instant case, the absence of sufficient guidelines allows various governmental officials to "pursue their personal predilections." *Smith v. Goguen,* 415 U.S. 566, 575 (1974); cf. *Shuttlesworth v. Birmingham,* 394 U.S. 147, 150-151 (1969) (Statute's uncertain reach delegates to officials standardless discretion which permits unjustified suppression of First Amendment freedoms in the public forum).

In the instant case, as in *Lovell v. Griffin,* 303 U.S. 444 (1938), since no attempt was made to tailor the restrictions to a substantive evil unrelated to the suppression of ideas, the Resolution creates an unacceptable risk that it will be used to suppress speech. In *Thornhill v. Alabama,* 310 U.S. 88 (1940), the Court concluded that the very existence of some broadly written statutes may have such a deterrent effect on free expression, and should, therefore, be subject to challenge even by a party whose own conduct may be unprotected. See also *Gooding v. Wilson,* 405 U.S. 518 (1972); *Lewis v. City of New Orleans,* 415 U.S. 130 (1974). As the Court stated in the *Thornhill* case:

> It is not merely the sporadic abuse of power by the censor but the pervasive threat inherent in its very existence that constitutes the danger to freedom of discussion....The existence of...a statute, which readily lends itself to harsh and discrimina-

> tory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure, results in a continuous and passive restraint on all freedom of discussion that might reasonably be regarded as within its purview.

Thornhill v. Alabama, 310 U.S. at 97-98.

The challenged Resolution is invalid on its face. Even if a more narrowly drawn time, place and manner restriction could be applied, in some circumstances, to the Respondents, it is facially invalid because of its vagueness, and because "it seeks to prohibit such a broad range of protected conduct that it is unconstitutionally overbroad." *City Council v. Taxpayers for Vincent,* 466 U.S. 789, 796 (1984). Moreover, there is "no readily apparent construction [that] suggests itself as a vehicle for rehabilitating [it]...." *Dombrowski v. Pfister,* 380 U.S. 479, 491 (1965). Finally, the number of impermissible applications will no doubt dwarf the number of permissible applications of the Resolution, which "has the potential to repeatedly chill the exercise of expressive activity by many individuals...." *New York v. Ferber,* 458 U.S. 747, 772 (1982).

CONCLUSION

The context of the public property in this case is in the nature of a traditional public forum or a designated public forum in which the state may not censor or draw distinctions with respect to the content of speech. *See Police Department of Chicago v. Moseley,* 408 U.S. 92 (1972); *Southeastern Promotions, Ltd. v. Conrad,* 420 U.S. 546 (1975); *Madison School District v. Wisconsin Employment Relations Commission,* 429 U.S. 167 (1976); *Carey v. Brown,* 447 U.S. 455 (1980); and *Widmar v. Vincent,* 454 U.S. 263 (1981). The speech activity in those cases, as in the present case, was not only traditional speech activity, but was also subjected to the same type of discriminatory treatment, censorship and, perhaps, animus that has been directed at Respondents' message. This sort of unequal

treatment of ideas was not permitted to stand in those cases, nor should it be in this case.

Whether or not this Court determines the Central Terminal Area to be a traditional public forum, it is inexorably one by designation. The Resolution evidences a clear intent to create a public forum. Moreover, there is no other valid basis, such as disruption or inconvenience, to justify the exclusion of Respondents when other speech activities having the same effects are permitted. The Petitioners' justifications do not add up to a particularized, compelling state goal that justifies overbroad, unnecessary and selectively hostile restrictions on protected expression and association.

Perhaps one person's speech is another person's blasphemy. Nevertheless, in one of the Supreme Court's earliest cases, *Cantwell v. Connecticut,* 310 U.S. 296, 310 (1940), this Court stated:

> In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbor. [Bitter controversies may occur but] the people of this nation have ordained in the light of history, that, in spite of the probabilities of excesses and abuses...these liberties are, in the long view, essential to the enlightened opinion and right conduct on the part of the citizens of a democracy.

In short, "...a State may not unduly suppress free communication of views, religious or other, under the guise of conserving desirable conditions." *Id.* at 308.

It is crystal clear that the Petitioners' exclusion of certain First Amendment activities from a public forum is neither a content-neutral nor a permissible policy. The ostensibly direct, nearly total and permanent ban violates Respondents' First Amendment freedoms of speech, association and assembly. The Resolution also violates the Equal Protection Clause of the Fourteenth Amendment. For these compelling reasons, the judgment of the Court of Appeals must be upheld.

Respectfully submitted,

James J. Knicely
Counsel of Record
John W. Whitehead
Gary C. Leedes
The Rutherford Institute
9411 Battle Street
Manassas, Virginia 22110
(703) 369-0100

A. Eric Johnston
The Rutherford Institute
of Alabama
P.O. Box 59561
Birmingham, Alabama 35259

Lynn M. Watwood, Jr.
The Rutherford Institute
of Colorado
One Civic Center Plaza -
Suite 340
1560 Broadway Street
Denver, Colorado 80202

Joseph S. Secola
The Rutherford Institute
of Connecticut
122 Broad Street
On the Green
Milford, Connecticut 06460

Alfred J. Lindh
The Rutherford Institute
of Delaware
1 Customs House Square
Wilmington, Delaware 19801

Ira W. Still, III
The Rutherford Institute
of Florida
6198 Laurel Lane
Tamarac, Florida 33319

William P. Hollberg
Wendell R. Bird
The Rutherford Institute
of Georgia
1275 Peachtree Street, N.E.
Atlanta, Georgia 30367

John K. Webb
The Rutherford Institute
of Kentucky
8 Ardery Place, Suite 4
Paris, Kentucky 40361

David A. French
The Rutherford Institute
of Michigan
2010 Devolson
Ann Arbor, Michigan 48104

Thomas W. Strahan
The Rutherford Institute
of Minnesota
1313 Fifth Street, S.E.
Minneapolis, Minnesota 55414

J. Douglas Alexander
The Rutherford Institute
of Montana
104 Second Avenue. S.W.
Sidney, Montana 59270

Victor E. Vouga
The Rutherford Institute
of Pennsylvania
234 West Pine Street
Grove City, Pennsylvania 16127

Les Bailey
The Rutherford Institute
of Tennessee
710 East Sullivan Street
Kingsport, Tennessee 37660

W. Charles Bundren
The Rutherford Institute
of Texas
P.O. Box 923
Dallas, Texas 75221

Steven W. Graber
The Rutherford Institute
of Virginia
P.O. Drawer GR
Williamsburg, Virginia 23187

Randall L. Trautwein
The Rutherford Institute
of West Virginia
Morris Building - Suite 200
845 Fourth Avenue
Huntington, West Virginia 25701

Supreme Court, U.S.
FILED
JAN 5 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-104

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

THE BOARD OF AIRPORT COMMISSIONERS OF THE CITY OF LOS ANGELES, et al.,
Petitioners,

v.

JEWS FOR JESUS, INC. AND ALAN HOWARD SNYDER, a/k/a AVI SNYDER,
Respondents.

On Petition For Writ Of Certiorari To The United States Court of Appeals For The Ninth Circuit

BRIEF OF COUNCIL ON RELIGIOUS FREEDOM AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

Of Counsel:
JAMES M. PARKER
1120 W. Loyola Street
Chicago, IL 60626

ROBERT W. NIXON
6840 Eastern Avenue, NW
Washington, DC 20012

HAROLD J. LANCE
204 N. San Antonio Avenue
Ontario CA 91762

ROLLAND TRUMAN
4522 Greenmeadow Road
Long Beach, CA 90808

LEE BOOTHBY
Counsel of Record
Attorney for Council on Religious Freedom, Amicus Curiae

Business Address:
208 W. Mars Street
Berrien Springs, MI 49103
(616) 471-7787

PRESS OF RAM PRINTING, HYATTSVILLE, MD 20781 (301) 864-6662

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	i
INTEREST OF *AMICUS CURIAE*	1
SUMMARY OF ARGUMENT	2
ARGUMENT	3
I. THE DESIGNATION OF THE CENTRAL TERMINAL AREA OF LOS ANGELES INTERNATIONAL AIRPORT AS A NONPUBLIC FORUM DOES NOT DETERMINE THE OUTCOME OF THIS CASE	3
A. Government Restrictions On Free Speech Must Be Justified By A Compelling State Interest Regardless Of The Type Of Forum Involved	3
B. The City Has Improperly Used Public Forum Analysis To Avoid Balancing First Amendment Values Against Other Government Interests	5
II. THE CITY'S RESTRICTION ON FREE SPEECH DOES NOT ADVANCE A COMPELLING STATE INTEREST	7
CONCLUSION	9

TABLE OF AUTHORITIES

CASES:	Page
Cornelius v. *NAACP Legal Defense & Education Fund*, 105 S.Ct. 34 (1985)	4, 6
Grayned v. *City of Rockford*, 408 U.S. 104 (1972)	4
Greer v. *Spock*, 424 U.S. 828 (1976)	4
Hague v. *CIO*, 307 U.S. 496 (1939)	4-5
Jones v. *North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119 (1977)	4
Lemon v. *Kurtzman*, 403 U.S. 602 (1971)	5
Sherbert v. *Verner*, 374 U.S. 398 (1963)	9
Tinker v. *Des Moines School District*, 393 U.S. 503 (1969)	7
United States v. *O'Brien*, 391 U.S. 367 (1968)	4
CONSTITUTIONAL AUTHORITIES:	
United States Constitution, Amendment One	*passim*

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-104

THE BOARD OF AIRPORT COMMISSIONERS OF THE CITY OF LOS ANGELES, et al.,

Petitioners,

v.

JEWS FOR JESUS, INC. and ALAN HOWARD SNYDER, a/k/a AVI SNYDER,

Respondents.

On Petition For For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

---

BRIEF OF COUNCIL ON RELIGIOUS FREEDOM AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF THE AMICUS CURIAE

The Council on Religious Freedom is a nonprofit corporation formed to uphold and promote the principles of religious liberty. The objectives and purposes of the organization include promoting the concept of the constitutional principle of the free exercise of religion and

opposing any encroachment by governmental agencies which would limit or tend to inhibit such exercise and other areas of concern which interfere with the full experience of religious freedom.

The Board of Directors of the Council on Religious Freedom is composed of individuals who are active in religious affairs, some in an official capacity, and some on a lay basis, but all recognize the importance of preserving and promoting the right to engage in evangelistic dissemination of religious beliefs as a part of the free exercise of religion.

SUMMARY OF ARGUMENT

First Amendment rights have always been accorded the highest protection by the Constitution and this Court. Governmental restrictions on free speech have been upheld only when justified by a compelling state interest that was advanced by the means least restrictive of First Amendment freedoms. The Court's analysis has always weighed the government's interests against First Amendment values.

In order to put the government's interests and the rights of individuals in proper balance, this Court developed public forum analysis. Public forum analysis allowed the Court to put in perspective both the government's interests and the burden on First Amendment rights by characterizing the location in which the governmental restriction operated.

Public forum doctrine was not intended to replace the compelling state interest/least restrictive means test. But that is what happens under the City's theory. Under the City's theory, First Amendment rights could be exercised only in areas designated by the government.

Regardless of the characterization given to the Central Terminal Area of Los Angeles International Airport under public forum analysis, the City ordinance must be justified by a compelling state interest, and it must use the least restrictive means to accomplish that interest. The City has not met this burden. Proper use of public forum analysis only helps to evaluate the government's interest. It does not replace the need to balance that interest against First Amendment values.

ARGUMENT

I. THE DESIGNATION OF THE CENTRAL TERMINAL AREA OF LOS ANGELES INTERNATIONAL AIRPORT AS A NONPUBLIC FORUM DOES NOT DETERMINE THE OUTCOME OF THIS CASE.

A. Government Restrictions On Free Speech Must be Justified By A Compelling State Interest Regardless Of The Type of Forum Involved.

This Case comes before the Court with the issues framed in a posture that poses great danger to fundamental First Amendment freedoms. While recognizing freedom of speech cannot be absolute, this Court has set very high standards that the government must meet in order to justify any burden on free speech.

> To characterize the quality of the governmental interest which must appear, the Court has employed a variety of descriptive terms: compelling; substantial; subordinating; paramount; cogent; strong. Whatever imprecision inheres in these terms, we think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amend-

> ment freedoms is no greater than is essential to the furtherance of that interest.

United States v. *O'Brien*, 391 U.S. 367, 376-377 (1968) (footnotes omitted). The two-step compelling state interest/least restrictive means analysis has been the touchstone of First Amendment jurisprudence. The first part of this analysis has involved a weighing of the governmental interests advanced by the challenged restriction.

In the last ten to fifteen years, the Court has developed the public forum doctrine to help in this analysis. The public forum doctrine analyzes the geographic location in which the government restriction on free expression operates.

The theory behind the doctrine is that government restriction of free speech is more likely to be justified by a compelling interest in certain locations than in others. Restrictions that operate on public property that have not traditionally been the site for public discourse are more likely to be justified. These places are termed nonpublic forums. Thus, restrictions on free speech have been upheld in prisons, *Jones* v. *North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119 (1977), military bases, *Greer* v. *Spock*, 424 U.S. 828 (1976), schools, *Grayned* v. *City of Rockford*, 408 U.S. 104 (1972), and the federal workplace, *Cornelius* v. *NAACP Legal Defense and Education Fund*, 105 S.Ct. 3439 (1985).

On the other hand, restrictions on free speech are less likely to be justified in places such as streets and parks which "have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions," *Hague* v. *CIO*,

307 U.S. 496, 515 (1939). These places are denominated public forums.

Public forum analysis can be a useful tool in weighing governmental interests asserted to justify restrictions on First Amendment rights. However, as this Court has recognized, "[a] certain momentum develops in constitutional theory and it can be a 'downhill thrust' easily set in motion but difficult to retard or stop," *Lemon* v. *Kurtzman*, 403 U.S. 602, 624 (1971). The public forum analysis put forward by the City of Los Angeles in this case is an example of a constitutional theory that has become a runaway train. But beneath the painfully obvious perversion of the theory by the City lies a more subtle problem that must be dealt with to set the theory back on the right tracks again.

B. The City Has Improperly Used Public Forum Analysis To Avoid Balancing First Amendment Values Against Other Governmental Interests.

Instead of being used to help place a value on the governmental interest that is asserted to justify the government's restriction on free speech, public forum analysis has begun to take the place of the compelling state interest/least restrictive means test in some cases. When this is done, fundamental First Amendment values are not given sufficient consideration. Instead, the right to free speech is made to depend on the characterization given to the site of its exercise. With such an analysis the strong protection historically given to First Amendment rights becomes available only at certain places. The result is the thinking the Board of Airport Commissioners had expressly stated in the subject ordinance that it may ban First Amendment activities completely without further thought or justification once it is determined that the

Central Terminal Area of Los Angeles International Airport is not a public forum.

The grave danger of such thinking can be seen in the result of public forum analysis thus far. Only public streets and parks have been universally recognized as traditional public forums in this Court's decisions:

> In addition to traditional public fora, a public forum may be created by government designation of a place or channel of communication for use by the public at large for assembly and speech, for use by certain speakers, or for the discussion of certain subjects. *Perry Education Association, supra*, at 45 and 46, n. 7, 74 L.Ed.2d 794, 103 S.Ct. 948. Of course, the Government "is not required to indefinitely retain the open character of the facility." *Id.*, at 47, 74 L.Ed.2d 794, 103 S.Ct. 948.
>
> The Government does not create a public forum by an action or by permitting limited discourse, but only by intentionally opening a non-traditional forum for public discourse. *Ibid.*

Cornelius v. *NAACP Legal Defense and Education Fund*, 105 S.Ct. 3439 (1985).

Under the City's theory, except in those few places recognized as traditional public forums, the exercise of free speech on public property becomes dependent on the government's decision on whether or not it will open or keep open that property to such expression. The First Amendment, designed as a restriction on the power of government, thus comes into play only at the discretion of that government. The fox is guarding the chicken coop.

This result is a perversion of First Amendment principles. "Under our Constitution, free speech is not a right given only to be so circumscribed that it exists in principle but not in fact. Freedom of expression would not truly

exist if the right could be exercised only in an area that a benevolent government has provided as a safe haven for crackpots." *Tinker* v. *Des Moines School District*, 393 U.S. 503, 513 (1969).

Public forum analysis, properly used, helps to put into perspective both the government interest that is asserted as a justification for a restriction on free speech and the extent of the burden such a restriction places on free speech. But this is not to say that even in non-public forums the government's interests do not have to be balanced with First Amendment values. In *Tinker*, the fact that the government regulation only restricted free speech inside a public high school, not a public forum, did not prevent it from running afoul of the Constitution.

II. THE CITY'S RESTRICTION ON FREE SPEECH DOES NOT ADVANCE A COMPELLING STATE INTEREST.

The City has not met its burden of proving that the extensive restriction on First Amendment freedoms contained in its ordinance is justified by a compelling state interest. It has not even attempted to meet this burden because of its assertion that the ordinance operates in a non-public forum and, therefore, no such justification is needed. The City does not contemplate any weighing of First Amendment values. Apparently the City believes that public forum analysis requires no more of it than a determination that the Central Terminal Area of the Los Angeles International Airport will not be open to free expression. This is not the case.

No matter what label is given to the airport terminal after public forum analysis, the City's restrictions on free speech are not justified. Ignoring the obvious over-

breadth and vagueness infirmities of the ordinance[1] and viewing the ordinance as a ban on leafleting, apparently how it was meant to be and was applied[2], the ordinance advances no state interest.

The City claims that the airport is dedicated solely to safe air travel and aiding the traveling public. It is assumed that under proper constitutional analysis this could be a claim that the government has a compelling interest in providing for safe and efficient air travel which is advanced by the ordinance. That the government has such a compelling interest is not disputed.

The conclusions that such a recognized interest is advanced by the ordinance is clearly wrong. The City has stipulated that the respondents' activities were not impeding or interfering with the use of the airport by passengers. The stipulation amounts to a recognition of the fact that the safe and efficient operation of the airport is in no way incompatible with the exercise of the respondents' First Amendment rights. Therefore, the government's interest is not advanced by the ordinance. Any possible interference with the dedicated purpose of the airport could be eliminated with less restrictive time, place, and manner regulations.

---

[1] The mind reels at trying to determine what is a "First Amendment activity" and therefore prohibited in the terminal: reading?; praying?; political discussion?

[2] It does not appear from the stipulation that the City has banned the selling of newspapers in the airport terminal, surely an activity protected by the First Amendment.

CONCLUSION

The compelling state interest/least restrictive alternative free exercise test, as announed in *Sherbert* v. *Verner*, 374 U.S. 398 (1963), and consistently followed by this Court in its progeny should be applied here. Therefore, the decision of the Ninth Circuit Court of Appeals should be affirmed.

Respectfully submitted

Lee Boothby
Counsel of Record
Attorney for Council on
Religious Freedom, Amicus Curiae

Business Address:
208 W. Mars Street
Berrien Springs, MI 49103
(616) 471-7787

Of Counsel:

JAMES M. PARKER
1120 W. Loyola Street
Chicago, IL 60626

ROBERT W. NIXON
6840 Eastern Avenue, NW
Washington, DC 20012

HAROLD J. LANCE
204 N. San Antonio Avenue
Ontario, CA 91762

ROLLAND TRUMAN
4522 Greenmeadow Road
Long Beach, CA 90808

(10)

No. 86-104

Supreme Court, U.S.
FILED
JAN 8 1987
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1986

THE BOARD OF AIRPORT COMMISSIONERS OF THE CITY OF LOS ANGELES, *et al.*,

Petitioners,

v.

JEWS FOR JESUS, INC., *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF THE INTERNATIONAL SOCIETY FOR KRISHNA CONSCIOUSNESS OF CALIFORNIA, INC., AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

DAVID M. LIBERMAN
9806 Washington Boulevard
Culver City, California 90232
(213) 204-0488

Attorney for Amicus Curiae International Society for Krishna Consciousness of California, Inc.

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

TABLE OF CONTENTS

	Page
INTEREST OF THE AMICUS	1
SUMMARY OF ARGUMENT	3
ARGUMENT	4
I. RESOLUTION NO. 13787 IS UNCERTAIN, AMBIGUOUS AND SPECULATIVE, AND LACKS THE FORCE OF LAW. FOR THIS REASON, JUDICIAL REVIEW IS NOT APPROPRIATE AT THE PRESENT TIME	4
A. History And Background Of Resolution No. 13787	6
B. The Present Case Is Nonjusticiable	8
II. A DECISION ON THE FEDERAL PUBLIC FORUM DOCTRINE WILL VIOLATE THE LONG-ESTABLISHED RULE OF AVOIDING FEDERAL CONSTITUTIONAL ADJUDICATION WHERE NONFEDERAL GROUNDS FOR DECISION ARE AVAILABLE	13
A. The Public, Non-rented Portions of LAX Are A Public Forum Under Article I, Section 2 Of The California Constitution	13
1. LAX Is A Public Forum	14
2. First Amendment Expression Is Compatible With The Intended Use of LAX	21
B. The District Court And Court Of Appeals Were Remiss In Deciding The Federal Constitutional Issue Prior To Considering California Public Forum Doctrine	22
CONCLUSION	28
APPENDIX A	App. 1
APPENDIX B	App. 14

TABLE OF AUTHORITIES

Cases	Page
Abbott Laboratories v. Gardner, 387 U.S. 136 (1967)	5, 9, 10, 11, 12
Alascom, Inc. v. F.E.C., 727 F.2d 1212 (D.C.Cir. 1984)	12
Ashwander v. Tennessee Valley Authority, 297 U.S. 288 (1936)	11, 24
Babbitt v. United Farmworkers National Union, 442 U.S. 289 (1979)	10
Bender v. Williamsport Area School District, 106 S.Ct. 1326 (1986, No. 84-773)	23
Bigelow v. Virginia, 421 U.S. 809 (1975)	13
California Bankers Association v. Schultz, 416 U.S. 21 (1974)	12
Carreras v. City of Anaheim, 768 F.2d 1039 (9th Cir. 1986)	15, 17, 20, 21
City of Mesquite v. Aladdin's Castle, 455 U.S. 283 (1982)	25, 26, 28
Doe v. Bolton, 410 U.S. 179 (1974)	12
Epperson v. Arkansas, 393 U.S. 97 (1968)	12
FCC v. Pacifica Foundation, 438 U.S. 726 (1978)	13
Gonzales v. Superior Court, 180 Cal.App.3d 1116, 226 Cal.Rptr. 164 (1986)	14, 19, 22
Grayned v. City of Rockford, 408 U.S. 104 (1972)	20
Guardianship of Roe, 383 Mass. 415, 421 N.E.2d 40 (1981)	27
Gulf Oil v. Bernard, 452 U.S. 89 (1981)	23
Hagans v. Lavine, 415 U.S. 528 (1974)	24, 26

TABLE OF AUTHORITIES—Continued

Page

In Re Hoffman, 67 Cal.2d 845, 434 P.2d 353, 64 Cal.Rptr. 97 (1967) ..... *passim*

In Re Lane, 71 Cal.2d 872, 457 P.2d 561, 79 Cal. Rptr. 789 (1969) 19

International Longshoremen's and Warehousemen's Union, Local 37 v. Boyd, 347 U.S. 222 (1954) 10

International Society For Krishna Consciousness v. Barber, 650 F.2d 430 (2d Cir. 1981) 2

International Society for Krishna Consciousness v. City of Los Angeles, Nos. CV-83-5229-ER, CV-84-0045-ER (June 29, 1984) 3, 6, 7, 8, 12

Jean v. Nelson, 105 S.Ct. 2992 (1985) (No. 84-5240) 23

Linmark Associates v. Willingboro, 431 U.S. 85 (1977) 13

Lloyd v. Tanner Corp., 407 U.S. 551 (1972) 22

Maryland Casualty Co. v. Pacific Coal & Oil Co., 312 U.S. 270 (1941) 7

Metromedia v. City of San Diego, 453 U.S. 490 (1981) (plurality opinion) 13

Mills v. Rogers, 457 U.S. 291 (1982) 26, 27, 28

Minnick v. California Dept. of Corrections, 452 U.S. 105 (1981) 26

Owen Equipment and Erection Co. v. Kroeger, 547 U.S. 365 (1978) 23

Pacific Gas and Electric Co. v. State Energy Resources Conservation & Development Commission, 461 U.S. 190 (1983) 5

TABLE OF AUTHORITIES—Continued

Page

People v. Fogelson, 21 Cal.3d 158, 577 P.2d 677, 145 Cal.Rptr. 542 (1979) 2, 18

Poe v. Ullman, 367 U.S. 497 (1961) 5, 11

Prisoners Union v. California Department of Corrections, 135 Cal.App.3d 930, 185 Cal.Rptr. 634 (1982) 15, 18, 19

PruneYard Shopping Center v. Robins, 447 U.S. 74 (1981) 27

Regional Rail Reorganization Cases, 419 U.S. 102 (1974) 5

Rescue Army v. Municipal Court of Los Angeles, 331 U.S. 549 (1947) 9

Robins v. PruneYard Shopping Center, 23 Cal.3d 899, 592 P.2d 341, 153 Cal.Rptr. 854 (1979) *aff'd sub nom. PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980) 14, 15, 18, 19

Siler v. Louisville & Nashville R. Co., 213 U.S. 175 (1909) 23, 24, 25, 26

Socialist Labor Party v. Gilligan, 406 U.S. 583 (1972) 9

Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975) 13

Spector Motor Service, Inc. v. McLaughlin, 323 U.S. 101 (1944) 25

Steffel v. Thompson, 415 U.S. 452 (1974) 12

Sussli v. City of San Mateo, 120 Cal.App.3d 1, 173 Cal.Rptr. 781 (1981) 19

Thomas v. Union Carbide Agricultural Co., 105 S.Ct. 3325 (1985) (No. 84-497) 5

Three Affiliated Tribes v. Wold Engineering, 467 U.S. 138 (1984, No. 82-629) 28

TABLE OF AUTHORITIES—Continued

Page

Toilet Goods Association v. Gardner, 387 U.S. 158 (1967) 12

U.C. Nuclear Weapons Labs Conversion Project v. Lawrence Livermore Laboratory, 154 Cal. App.3d 1157, 201 Cal.Rptr. 837 (1984) 14, 15, 18, 19, 20

United Mine Workers v. Gibbs, 383 U.S. 715 (1966) 26

United States v. Hastings, 296 U.S. 188 (1935) 28

Wilson v. Superior Court, 13 Cal.3d 652, 532 P.2d 116, 119 Cal.Rptr. 468 (1975) 14

Wolin v. Port Authority, 392 F.2d 83 (2d Cir.) *cert. denied*, 393 U.S. 940 (1968) 17

Younger v. Harris, 401 U.S. 37 (1971) 10

Zemel v. Rusk, 381 U.S. 1 (1965) 12

CONSTITUTIONS AND CHARTERS

Cal. Const. art. I, section 2 ..... 4, 13, 14

Los Angeles City Charter, Article XXIX 7, 8

U.S. Const. amend. I ..... *passim*

BOOKS AND TREATISES

13A C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure*, § 1352 (1984) 9

Kalven, *The Concept of the Public Forum*, Cox v. Louisiana, 1965 S.Ct. Rev. 1 22

T. Emerson, *Toward A Theory of The First Amendment* (1966) 22

No. 86-104

In The

Supreme Court of the United States

October Term, 1986

THE BOARD OF AIRPORT COMMISSIONERS OF THE CITY OF LOS ANGELES, *et al.*,

Petitioners,

v.

JEWS FOR JESUS, INC., *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF THE INTERNATIONAL SOCIETY FOR KRISHNA CONSCIOUSNESS OF CALIFORNIA, INC., AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

INTEREST OF THE AMICUS

This brief *amicus curiae* is submitted in suport of the respondents by the International Society for Krishna Consciousness of California, Inc. (ISKCON), a not-for-profit religious corporation in Los Angeles, California. The brief is filed with the consent of the parties, as pro-

vided by the rules of this Court. Letters confirming the consent of the parties have been or will be filed with the clerk.

Members of ISKCON adhere to the principles of *Gaudiya Vaishnavism*, or Krishna Consciousness, which, as a central tenet of its theology and beliefs requires its followers to regularly venture into public places for the purposes of distributing religious literature, soliciting funds to support the religion, and encouraging members of the public to participate in various Krishna Consciousness activities. Known in the sanskrit language as *sankirtan*, this activity lies at the core of the Krishna Consciousness religion, and is its very life blood. *See International Society for Krishna Consciousness v. Barber*, 650 F.2d 430, 442-43 (2d Cir. 1981).

Members of ISKCON have a deep-rooted, long-standing interest in the status of Los Angeles International Airport (LAX) as a public forum. For over 15 years, they have practiced *sankirtan* in the interior, non-rented public areas of the airport, and have an intimate familiarity with the history and usage of LAX as a situs for the exercise of First Amendment rights. *See, e.g., People v. Fogelson*, 21 Cal.3d 158, 577 P.2d 677, 145 Cal.Rptr. 542 (1979).

Amicus is also conversant with the background and history of Resolution No. 13787, which seeks to prohibit all First Amendment activities, including speech, proselytization, and literature distribution, from the interior portions of the airport. Of particular significance to the present case, Amicus were recently involved in a state and federal constitutional challenge to the validity of Resolution No. 13787, which was dismissed by the federal district

court for want of subject matter jurisdiction. *International Society for Krishna Consciousness v. City of Los Angeles*, Nos. CV-83-5229-ER, CV-84-0045-ER (June 29, 1984) (Appendix A) [hereinafter cited as *ISKCON v. Los Angeles*].[01]

ISKCON thus has a critical interest in the outcome of the present case. If LAX is deemed to be a non-public forum, major portions of publicly owned airports, the principal transportation centers for the United States and the world, will, for the first time with judicial sanction be declared speech-free zones. Such a result would be disastrous for fledging organizations and religions such as ISKCON, whose very existence may turn on access to such public facilities as LAX.

———o———

SUMMARY OF ARGUMENT

Federal courts are obligated to avoid deciding constitutional questions both where the controversy between the parties is not ripe for review and where nonfederal grounds are available for decision. Each of these circumstances is present here.

First, the history and background of Resolution No. 13787 reveals that the resolution lacks the force of law. Specifically, as confirmed by federal district court decision involving Amicus herein, without formal approval by the Los Angeles City Council, the resolution is unenforceable. Hence, the scope and application of the resolution is con-

---

[01]The opinion in *ISKCON v. Los Angeles* appears as Appendix A to this brief, and is cited to in the form "App."

tingent, remote and speculative, and the present case is not yet ripe for review.

Second, regardless of whether the public terminals of LAX area are a public forum under the Federal Constitution, they are certainly so under the Liberty of Speech Clause of the California Constitution, article I, section 2. The district court and court of appeals thus erred in bypassing the readily available nonfederal ground in favor of reaching the merits of the federal constitutional question.

Important policy concerns underlying and emanating from Article III strongly counsel the decision below should be vacated, and the case remanded to the court of appeals with instructions for the action to be dismissed for lack of ripeness or, in the alternative, for consideration of the state constitutional issue.

ARGUMENT

I.

RESOLUTION NO. 13787 IS UNCERTAIN, AMBIGUOUS AND SPECULATIVE, AND LACKS THE FORCE OF LAW. FOR THIS REASON, JUDICIAL REVIEW IS NOT APPROPRIATE AT THE PRESENT TIME.

A serious question exists as to whether under local law Resolution No. 13787 is enforceable, or whether it is merely a horatory expression of the airport board's predilictions. The answer to this question is crucial to the present controversy, because the ripeness doctrine prevents federal courts from deciding theoretical or abstract ques-

tions that do not yet have a concrete impact on the parties. *See Abbott Laboratories v. Gardner,* 387 U.S. 136, 148-49 (1967); *accord, Thomas v. Union Carbide Agricultural Products Co.,* 105 S.Ct. 3325, 3333 (1985) (No. 84-497); *Pacific Gas and Electric Co. v. State Energy Resources Conservation & Development Commission,* 461 U.S. 190, 200 (1983).[02]

"[R]ipeness is peculiarly a question of timing." *Regional Rail Reorganization Cases,* 419 U.S. 102, 140 (1974). The doctrine considers the dual factors of "fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration" *Abbott Laboratories,* 387 U.S. at 149, in determining whether a particular issue is fit for review.

Here, these factors, when viewed in the context of the history and background of Resolution No. 13787, strongly indicate that judicial review of the present controversy is, for two primary reasons, inappropriate: (1) the injury complained of—purported enforcement of Resolution No. 13787 through some form of civil adjudication—is too contingent and remote to justify present adjudication; and (2) the parties have not and will not suffer any appreciable hardships by the postponement or declining of judicial review.

---

[02]The ripeness doctrine has its roots in both the Article III "case or controversy" requirement, and in discretionary reasons of policy for refusing to exercise existing power. *See Regional Rail Reorganization Act Case,* 419 U.S. 102, 138 (1974); *Poe v. Ullman,* 367 U.S. 497, 502-505 (1961).

A. History And Background Of Resolution No. 13787.

Both issues that petitioners seek to have resolved in this case regarding the status of LAX as a public forum arise only as a result of the passage of Resolution No. 13787 by the Board of Airport Commissioners on July 13, 1983.

The present case was filed approximately one year after passage of the resolution, on July 17, 1984. Less than three weeks earlier, however, the United States District Court for the Central District of California had found in parallel litigation challenging the same resolution that "whether the resolution violates the First Amendment is not an actual case or controversy," and that "[t]here is not sufficient adversity between the parties to make determination of the federal constitutional question appropriate." *ISKCON v. Los Angeles*, App. 10.[03]

The district court stated:

> [T]he Los Angeles City Charter provides that the airport board 'shall have power . . . to make and en-

---

[03] *ISKCON v. Los Angeles* was filed in the California Superior Court on July 18, 1983, and was removed on August 12, 1983. A first amended complaint was filed on October 24, 1983, seeking a declaration that Resolution No. 13787 was unconstitutional and an injunction against its enforcement. On January 5, 1984, the City of Los Angeles filed a second lawsuit against ISKCON and four other organizations. The City asked for a declaration that the resolution was constitutionally valid and an injunction forbidding the five named organizations from violating it. The two actions were consolidated.

The city's suit was dismissed for want of subject matter jurisdiction in that the claim for a declaration that the resolution was constitutional did not constitute a federal question. *ISKCON v. Los Angeles*, App. 3-6. It is, however, the court's ruling on the action by ISKCON—the suit that was removed from state court—that is of particular relevance here.

> force all necessary rules and regulations governing the use and control of all municipal airports within the City of Los Angeles.' City Charter Art. XXIV, § 239. The provision goes on to state that 'said regulations shall be approved by the Council by ordinance which shall prescribe the penalties for the violation of such rules and regulations.' Section 239.2(1) states that the general manager of the airport department 'shall have the power and duty to enforce all orders, rules and regulations adopted by the Board.' The charter does not provide for the Board to pass *resolutions*, as it has in this case. Nor has the City Council ratified the Board's resolution.

Id. at 9 (emphasis in original).[04]

The court thus remanded the case to state court, *id.* at 10, where it is pending.

Subsequent to *ISKCON v. Los Angeles*, there is still no indication that the airport board has promulgated any rules and regulations as to the conduct of First Amend-

---

[04]The court added:

> Further evidence that there is not case or controversy 'of sufficient immediacy and reality to warrant the issuance of a declaratory judgment,' *Maryland Casualty Co.*, 312 U.S. 270, is found in the City's answer to ISKCON's complaint. The city states defendants, and each of them, deny that Resolution No. 13787 adopted by the Board has been enforced against the plaintiff or against anyone: [sic] ¶ 5, and 'defendants, and each of them, allege that pursuant to City Charter § 239 all rules must be approved by the City Council.' ¶ 6.
>
> The City does not substantively address this argument in its reply, except to cite the standard and to observe that ISKCON initiated the suit. That does not change the preceding analysis—the requirement of an actual controversy is jurisdictional and as such, can be raised by any party or the Court sua sponte at any time.

Id. at 9.

ment activities at the airport nor, as the court in *ISKCON v. Los Angeles* noted, has it sought or obtained approval of the resolution, by ordinance or otherwise, from the city council. Instead, the board has adhered to the original "resolution" that merely describes itself as "a general policy procedure." Resolution No. 13787. It is, accordingly, by no means clear that the existence of the resolution, without more, can serve to create a justiciable controversy.

B. The Present Case Is Nonjusticiable.

The facts upon which the district court and court of appeals apparently believed that a justiciable controversy existed do not, when reviewed in light of the history, described above, dispel the doubts which the history creates. The key element to the present case seems to be the stipulation that an "uniformed peace officer" at one time handed respondent Alan Snyder a copy of the resolution while Snyder was distributing free religious literature at the airport, "ordered Snyder to cease," and "further advised Snyder that any failure to comply . . . would subject Snyder to legal action by the City Attorney pursuant to the express terms of Resolution No. 13787." Stipulation of Facts, para. 69; Jt. App. 19a.

More questions are raised, however, than are answered by the stipulation. At the very least, and especially in light of the quoted passage from *ISKCON v. Los Angeles*, it appears that the airport board, by the express terms of section 239 of the City Charter[05] could not have taken

---

[05]The relevant portion of the City Charter is appended hereto as Appendix B.

legal action against respondents until the city council formally approved the resolution by promulgating it as a municipal ordinance, and prescribing the penalties for its violation. Thus, for aught that now appears, the action by the police officer was merely a bluff or hollow threat at best, and the "resolution" is a mere piece of paper that does not and cannot affect the legal rights of anyone.

In this posture, the dual components of *Abbott Laboratories* are plainly satisfied. First, because Resolution No. 13787 entails "uncertain or contingent future events that may not occur as anticipated, or indeed may not occur at all." 13A C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 1352, at 112 (1984), the issues which petitioners raise are not fit for judicial decision.

In *Socialist Labor Party v. Gilligan*, 406 U.S. 583 (1972), for example, the Court refused, after other issues in the case had become moot, to review a constitutional challenge to a state requirement that all political parties seeking a position on the ballot must file a loyalty oath. The Court reasoned that "[n]othing in the record shows that appellants have suffered any injury thus far, and the law's future effect remains wholly speculative."[106]

---

[106] *Cf. Rescue Army v. Municipal Court of Los Angeles*, 331 U.S. 549 (1947) where the Court refused to review a California decision denying a claim under the Federal Establishment Clause because it was unable to determine with certainty how much of the challenged statute was implicated in the case: "[J]urisdiction . . . should be exerted only when the jurisdictional question presented by the proceeding . . . tenders the underlying constitutional issues in clean-cut and concrete form, unclouded by any serious problem of construction relating either to the terms of the questioned legislation or its interpretation by the state courts." *Id.* at 584.

Similarly, in *International Longshoremen's & Warehousemen's Union Local 37 v. Boyd*, 347 U.S. 222 (1954), the Court held that a federal court could not grant declaratory judgment on the constitutionality of a particular construction of a federal statute where the conduct had not yet occurred, and where the challenged construction had not yet been ratified by the federal agency charged with its administration and enforcement. In language particularly propos here, the Court stated: "Determination of the scope and constitutionality of legislation in advance of its immediate adverse effect in the context of a concrete case involves too remote and abstract an inquiry for the proper exercise of the judicial function." *Id.* at 224.

The second component of *Abbott Laboratories* is satisfied because there is no realistic threat of actual enforcement of the resolution in its present form,[07] and because respondents and other groups have been actually proselytizing and distributing literature in LAX for many years without any untoward interference with airport operations. Consequently, there is no meaningful hardship to the parties of withholding court consideration until the controversy between them is more sharply defined.

In this regard, it has long been established as part of the "case or controversy" requirement of Article III that

---

[07]*See Babbitt v. United Farmworkers National Union*, 442 U.S. 289, 298 (1979) ("A plaintiff who challenges a statute must demonstrate a *realistic* danger of sustaining a direct injury as a result of the statute's operation or enforcement." (emphasis supplied); *cf. Younger v. Harris*, 401 U.S. 37, 42 (1971) ("persons having no fears of state prosecution except those that are imaginary or speculative, are not to be accepted as appropriate plaintiffs.")

an agency's "pronouncements, policies, and programs . . . d[o] not give rise to a justiciable controversy save as they ha[ve] fruition in action of a definitive and concrete character constituting an actual or threatened interference with the rights of the persons complaining." *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 324 (1936). Accordingly, in order for a contested action to be considered ripe for review, the impact on the parties must be "sufficiently direct and immediate as to render the issue appropriate for judicial review at this stage." *Abbott Laboratories*, 387 U.S. at 152.

In thus refusing to declare Connecticut's law prohibiting the use of contraceptives invalid, the Court in *Poe v. Ullman*, 367 U.S. 497 (1961), emphasized that "judicial power is to be exercised to strike down legislation, whether state or federal, only at the insistence of one who is himself immediately harmed, or immediately threatened with harm, by the challenged action." *Id.* at 504. Of particular interest here, *Poe* noted that even the "existence of a state penal statute would constitute insufficient grounds to support a federal court's adjudication of its constitutionality in proceedings brought against the State's prosecuting officials if real threat of enforcement is wanting." *Id.* at 507.

If the existence of an unenforced penal statute was insufficient to raise federal jurisdiction in *Poe*, then surely an unenforceable agency resolution such as is in issue here should be insufficient to invoke federal jurisdiction

as well.[08] Indeed, Resolution No. 13787 has never been formally enforced against anyone since its passage in 1983, nor in its present form can it be.

Nor, in this context, can it be claimed that the resolution creates a "chilling effect" on First Amendment activities. As illustrated by *ISKCON v. Los Angeles*, this case is not the first instance where airport officials have presented the resolution to individuals exercising First Amendment rights at LAX, yet for all the hyperbole and excitation, the resolution remains unenforced and unenforceable.

Accordingly, there is no immediate, direct and significant hardship to the parties of withholding judicial consideration of the public forum question,[09] and the writ of

---

[08]In this regard, respondents are not faced with the dilemma of incurring the disadvantages of complying with the resolution or risking penalties for noncompliance, as were the challenging parties in such cases as *Doe v. Bolton*, 410 U.S. 179, 188 (1974), *Epperson v. Arkansas*, 393 U.S. 97, 100 (1968), and *Abbott Laboratories*, 387 U.S. at 152-53. Moreover, it is indisputable that no criminal action can be initiated. Nonetheless, the petitioners apparently contend that a case or controversy is created by the mere possibility of civil adjudication. This ground, however, is too remote, and does not satisfy the requirements of *Steffel v. Thompson*, 415 U.S. 452 (1974) where it is unknown how the state courts would treat such an action. Additionally, the mere *potential* of civil adjudication would expand the case or controversy requirement beyond any acceptable or manageable boundaries. *See Toilet Goods Association v. Gardner*, 387 U.S. 158, 164 (1967); *Alascom, Inc. v. F.E.C.*, 727 F.2d 1212, 1217 (D.C. Cir. 1984).

[09]At the very least, development of a more concrete set of facts is required. *See California Bankers Association v. Shultz*, 416 U.S. 21, 56-57 (1974); *Zemel v. Rusk*, 381 U.S. 1, 19-20 (1965). This is especially so in a freedom of expression context where "each medium of expression presents special First Amend-

(Continued on following page)

certiorari should be dismissed as improvidently granted for want of ripeness.

II.

A DECISION ON THE FEDERAL PUBLIC FORUM DOCTRINE WILL VIOLATE THE LONG ESTABLISHED RULE OF AVOIDING FEDERAL CONSTITUTIONAL ADJUDICATION WHERE NONFEDERAL GROUNDS FOR DECISION ARE AVAILABLE.

A. The Public, Non-rented Portions Of LAX Are A Public Forum Under Article I, Section 2 Of The California Constitution.[1]

Respondents, as well as other groups and individuals seeking to engage in expression in California facilities such as airports, have a right of access to the public, non-rented portions of LAX which is independent of federal public forum doctrine. The existence of such a right was asserted by the respondents at the onset of litigation against the petitioners, *see* Complaint, paras. 24, 26, and was argued extensively in both the district court, *see* Trial Brief Of Plaintiffs And Counterdefendants, at 39-45, and the Court of Appeals. *See* Appellee's Brief, at 6-18.

(Continued from previous page)

ment problems" *FCC v. Pacifica Foundation*, 438 U.S. 726, 748 (1978), "which must be assessed . . . by standards suited to it." *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 547 (1975). Courts must "assess[] the First Amendment interest at stake and weigh it against the public interest allegedly served by the regulation." *Linmark Associates, Inc. v. Willingboro*, 431 U.S. 85, 91 (1977) (quoting *Bigelow v. Virginia*, 421 U.S. 809, 826 (1975)). Moreover, "a particularized inquiry into the nature of the conflicting interests at stake . . . *beginning with a precise appraisal of the character of the ordinance as it affects communication*," *Metromedia v. City of San Diego*, 453 U.S. 490, 503 (1981) (plurality opinion) (emphasis supplied), is required. On the present record, such an analysis is plainly not possible.

Inexplicably, both courts ignored the California public forum issue, although federal courts are under a clear obligation to avoid deciding Federal Constitutional questions where nonfederal grounds for decision are available.

1. LAX Is A Public Forum.

Article I, section 2 of the California Constitution does not merely track the language of the First Amendment. Rather it is a "protective provision more definitive and inclusive than the First Amendment." *Wilson v. Superior Court*, 13 Cal.3d 652, 658, 532 P.2d 116, 120, 119 Cal.Rptr. 468, 472 (1975); *accord, Robins v. PruneYard Shopping Center*, 23 Cal.3d 899, 908, 592 P.2d 341, 346, 153 Cal.Rptr. 854, 859 (1979), *aff'd sub nom. PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980); *Gonzales v. Superior Court*, 180 Cal.App.3d 1116, 1122, 226 Cal.Rptr. 164, 168 (1986); *U.C. Nuclear Weapons Labs Conversion Project v. Lawrence Livermore Laborary*, 154 Cal.App.3d 1157, 1163-164, 201 Cal.Rptr. 837, 843 (1984).[10]

---

[10]Cal. Const. art. I, § 2 provides that "Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press." U.S. Const. amend. I states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people to peaceably assemble, and to petition the Government for a redress of grievances." Although the free speech provision of the California and Federal Constitutions are thus similar, "they are not the same." *Gonzales v. Superior Court*, 180 Cal.App.3d 1116, 1122, 226 Cal.Rptr. 164, 167 (1986).

Under the California Constitution, then, such facilities as stadia,[11] convention centers,[12] shopping centers,[13] prison grounds,[14] interior premises of state owned visitor's centers,[15] and major transportation terminals,[16] must be made available for the reasonable exercise of First Amendment rights. "To protect free speech and petitioning is a goal" of the highest order under the California Constitution, *Robins*, 23 Cal.3d at 908, 592 P.2d at 346, 153 Cal.Rptr. at 859, which may be overborne only if it is outweighed by substantial governmental interests in restricting expression at a particular time and place. *See Prisoners Union v. California Department of Corrections*, 135 Cal.App.3d 930, 938-41, 185 Cal.Rptr. 634, 638-40 (1982).

The seminal California decision, *In re Hoffman*, 67 Cal. 2d 845, 434 P.2d 353, 64 Cal.Rptr. 97 (1967), involved a fact situation closely analogous to the present case. In *Hoffman*, an anti-war group of approximately 15 persons sought access to the main entrance, lobby and patio areas of the Union Station railway terminal in Los Angeles in order to distribute leaflets and discuss their views with persons in the area. *Id.* at 847, 434 P.2d at 354, 64 Cal.Rptr.

---

[11] *Carreras v. City of Anaheim*, 768 F.2d 1039, 1045-046 (9th Cir. 1986) (Anaheim Stadium).

[12] *Id.* at 1046-047 (Anaheim Convention Center).

[13] *Robins v. PruneYard Shopping Center*, 23 Cal.3d 899, 592 P.2d 341, 153 Cal.Rptr. 854 (1975), *aff'd sub. nom. PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980).

[14] *Prisoners Union v. California Department of Corrections*, 135 Cal.App.3d 930, 185 Cal.Rptr. 634 (1982).

[15] *U.C. Nuclear Weapons Labs Conversion Project v. Lawrence Livermore Laboratory*, 154 Cal.App.3d 1157, 201 Cal.Rptr. 837 (1984).

[16] *In re Hoffman*, 67 Cal.2d 845, 434 P.2d 353, 64 Cal.Rptr. 97 (1967).

at 98. Although the City conceded that the leafleters "did not impede the flow of traffic to or from the station or interfere with the purchase or sale of tickets or the conduct of business by the restaurants, bar, or magazine and newspaper stand located on the premises," *id.*, they were nonetheless convicted of violating a city ordinance restricting their right to conduct such activities in a railroad station, and subsequently sought a writ of habeas corpus from the California Supreme Court on the basis that the ordinance unconstitutionally abridged their right of free speech. *Id.*

In granting the writ, Chief Justice Traynor recognized for the Court that "a railway station is like a public street or park. Noise and commotion are characteristic of the normal operation of a railway station. The railroads seek neither privacy within nor exclusive possession of their station." 67 Cal.2d at 851, 434 P.2d at 356, 64 Cal.Rptr. at 100.[17]

---

[17]Union Station in Los Angeles was described as follows: "It is spacious and open to the community as a center for rail transportation. It also houses a restaurant, a snack bar, a cocktail lounge, and a magazine stand. Not only passengers but friends and relatives of passengers may freely enter and use the facilities of the waiting room. Entry is also free to those who seek food or drink or magazines or newspapers." 67 Cal.2d at 847, 434 P.2d at 354, 64 Cal.Rptr. at 98.

If the railway station in *Hoffman* is a public forum based upon the above-described facts, then the interior public areas of LAX are public forums *a fortiori*. As in *Hoffman*, the interior terminal areas at LAX are spacious facilities open to the general public without restriction. Seventeen gift shops, 12 cocktail lounges, three snack bars, four duty-free shops, 16 insurance outlets, four American Express offices, six postal centers, five money exchanges, numerous car rental facilities, an ice cream

(Continued on following page)

More importantly, *Hoffman* articulated the test for determining whether a particular facility constitutes a public forum under the California Liberty of Speech Clause:

> The primary uses of municipal property can amply be protected by ordinances that prohibit activities that interfere with those uses. . . . First Amendment activities [cannot] be prohibited solely because the property involved is not maintained primarily as a forum for such activities.
>
> . . .
>
> [I]n the present case, the test is not whether petitioners' use of the station was a railway use but whether it interfered with that use.

Id. at 850-51, 434 P.2d at 356, 64 Cal.Rptr. at 100.[18]

Hoffman thus directly and unambiguously rebuts the contention that all expressive activities not directly related to air transportation and navigation may be entirely excluded from the terminal buildings of LAX.[19] Indeed,

---

(Continued from previous page)

shop, a barber shop, and a Christian Science reading room are interspersed throughout the eight existing terminals, and are accessible to the general public for no fee. Moreover, as many non-travelers use the various terminals as do actual travelers. Stipulation of Facts, paras. 4, 10; Jt. App. 7a, 9a.

[18]*Robins* makes it clear that *Hoffman* rested solidly on California law. 23 Cal.3d at 908, 592 P.2d at 347, 153 Cal.Rptr. at 859; *accord, Carreras,* 768 F.2d at 1044, n.8.

[19]*See also Wolin v. Port Authority,* 392 F.2d 83, 90 (2d Cir.) *cert. denied,* 393 U.S. 940 (1968) ("The Terminal Building is an appropriate place for expressing one's views precisely because the primary activity for which it is designed is attended with noisy crowds and vehicles, some unrest and less than perfect order. Like a covered marketplace area, the congestion justifies rules regulating other forms of activity, but it seems undeniable that the place should be available for use in appropriate ways as a public forum.") (footnote omitted).

in *People v. Fogelson*, 21 Cal.3d 158, 577 P.2d 677, 145 Cal. Rptr. 542 (1978), which concerned a facial overbreadth challenge to a City of Los Angeles solicitation ordinance applied to ISKCON's activities at LAX,[20] the California Supreme Court cited *Hoffman* in noting that the interior, public areas of municipal buildings such as LAX are "appropriate areas for exercise of protected activity." *Id.* at 167, n.9, 577 P.2d at 682, n.9, 145 Cal.Rptr. at 547, n.9.

The ongoing vitality and application of the compatibility test is also demonstrated by *Robins*, where the *Hoffman* formulation was cited with approval.

> Chief Justice Traynor's opinion made it clear that . . . 'the test is not whether petitioners' use of the station was a railway use but whether it interfered with that use.' . . . The opinion thus affirms that the public interest in peaceful speech outweighs the desire of property owners for control over their property.

23 Cal.3d at 909, 592 P.2d at 347, 153 Cal.Rptr. at 860.[21]

---

[20]Specifically, a member of ISKCON was arrested and convicted in Municipal Court of violating the solicitation ordinance, which the California Supreme Court ultimately found "unconstitutional on its face." 21 Cal.3d at 167, 577 P.2d at 682, 145 Cal.Rptr. at 547.

[21]A recent California public forum decision, *Prisoners Union*, also quotes this passage from *Hoffman*, 135 Cal.App.3d at 939, Cal.Rptr. at 639, and observes in addition that the precedential value of *Hoffman* "is not diminished by the fact that the opinion cited federal law. "*Id.* at 939, n.3, 185 Cal.Rptr. at 639, n.3. Indeed, "[k]eeping in mind that the free speech and petitioning provision in the California Constitution does not *mirror* the First Amendment either in form or content . . . we draw on both provisions for the analysis required in this state." *Lawrence Livermore Laboratory*, 154 Cal.App.3d at 1163, 201 Cal. Rptr. at 843. (emphasis in original) Accordingly, for state constitutional analysis, "[f]ederal principles are relevant but not

(Continued on following page)

Other recent cases also reflect the rejection of a categorical approach to the existence of public forums under California law. In *Prisoners Union*, the California court of appeal rejected a "categorical ban on communication among free citizens in a public parking lot, simply because the parking lot is located on prison property." 135 Cal. App.3d at 938, 185 Cal.Rptr. at 638 (footnote omitted). The nature of the facility was, of course, "relevant, but *not* determinative." *Id.* at 939, 185 Cal.Rptr. at 639 (emphasis supplied). Rather, in every case in which the propriety of expression is at issue, "the answer depends upon whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time." *Id.*[22]

In *Lawrence Livermore Laboratory*, a case factually similar to the present case, the court of appeal expressly recognized that it was faced with another "dispute over

---

(Continued from previous page)

conclusive so long as federal rights are protected." *PruneYard*, 23 Cal.3d at 909, 592 P.2d at 346, 153 Cal.Rptr. at 859; *accord, Gonzales*, 180 Cal.App.3d at 1123, 226 Cal.Rptr. at 168 ("Federal law can provide guidance, even though it is not controlling in this area.").

[22]California decisions, moreover, leave no doubt that "[i]t is immaterial that another forum, equally effective," may be available to the respondents. *Hoffman*, 67 Cal.2d at 852 n.7, 434 P.2d at 857 n.7, 64 Cal.Rptr. at 101, n.7. Indeed, " . . . it is settled law that within the context of the traditional public forum, abridgment of the freedom of expression may not be conditional upon the existence of alternative channels of communication." *Sussli v. City of San Mateo*, 120 Cal.App.3d 1, 8, 173 Cal.Rptr. 781, 785 (1981). Hence, in the absence of "some conflicting interest that could be protected in no other way, [respondents] had the right to choose their own forum." *Id.*; *accord, Gonzales*, 180 Cal.App.3d at 1127, 226 Cal.Rptr. at 171; *see also In re Lane*, 71 Cal.2d 872, 457 P.2d 561, 79 Cal.Rptr. 789 (1969).

the proper analytical approach to free speech/public forum issues." 154 Cal.App.3d at 1165, 201 Cal.Rptr. In holding that an enclosed "Visitors Center . . . owned and operated by the government and open to the public at large" *id.* at 1168, 201 Cal.Rptr. at 876, had to be made available to non-governmental persons seeking to express their views, the court emphasized that the crucial question was not whether the place in question was a public street or park, or had been affirmatively dedicated to expression, but " 'whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time.' " *Id.* (quoting *Grayned v. City of Rockford,* 408 U.S. 104, 116, (1972)).

This conclusion was recently reiterated in *Carreras v. City of Anaheim,* 768 F.2d 1039 (9th Cir. 1985), which underscored that

> for the purposes of the California Liberty of Speech Clause, the 'public forum' doctrine is not limited to traditional public forums such as streets, sidewalks, and parks or to sites dedicated to communicative activity such as municipal theaters. Rather, the test under California law is whether the communicative activity 'is basically incompatible with the normal activity of a particular place at a particular time.'

Id. at 1045 (citations omitted).[23]

---

[23]Significantly, the court in *Carreras* acknowledged the district court's reliance on federal public forum analysis in finding that the exterior parking lots and sidewalks of Anaheim Stadium did not constitute a public forum. 768 F.2d at 1045, n.11. The court emphasized, however, that "[w]hatever the validity of this reasoning may be under federal law, it is not determinative under the California Liberty of Speech Clause." *Id.*

2. First Amendment Expression Is Compatible With The Intended Use Of LAX.

Under California law, then, LAX may be declared off limits to First Amendment expression "only if the City meets its burden of establishing the basic incompatibility between the expressive activity and the intended use of the facility." *Id.* Here, no such showing can be made.

Petitioners candidly admit that they are not aware "of any occasion on which a member of Jews for Jesus, . . . while engaged in the free distribution of religious literature in the interior walkways of LAX, . . . intentionally . . . interfered with, blocked, obstructed, physically touched in an offensive manner or otherwise . . . annoyed any other person." Stipulation of Facts, par. 63; Jt. App. 18a.

More importantly, the petitioners also admit that at the time he was asked to leave the airport premises while he was distributing his religious literature, respondent Avi Snyder "was not blocking any entrance, exit, stairway, escalator, elevator, door, or otherwise inhibiting the free flow of pedestrian traffic on the pedestrian walkway located inside Terminal 4 at LAX." Stipulation of Facts, par. 67; Jt. App. 19a. Nor was Snyder "touching, annoying, blocking, obstructing, or otherwise harassing any other person present in the immediate vicinity of his location." Stipulation of Facts, par. 68; Jt. App. 19a. Thus, there is absolutely no evidence in the record to indicate that the distribution of religious literature is in any way incompatible with the intended use of LAX. *See Carreras*, 768 F.2d at 1045-046.

Consequently, because public places such as LAX are undoubtedly "important facilit[ies] for public discussion,"

such facilities must constitute "a public forum that the citizen can commandeer." Kalven, *The Concept of the Public Forum*, Cox v. Louisiana, 1965 S.Ct. Rev. 1, 12.[24] Indeed, the basic guarantee of a meaningful system of freedom of expression is to assure this access, *see* T. Emerson, *Toward A Theory of the First Amendment* 19 (1966), and "the generosity and empathy with which such facilities are made available is an index of freedom." *Kalven, supra,* at 12.

The California Constitution vigorously protects this fundamental right. "Mere legislative preferences or beliefs regarding matters of public convenience may not support the diminution of such vital rights as the exercise of free speech in our democracy." *Gonzales,* 180 Cal.App.3d at 1122, 226 Cal.Rptr. at 167.

Hence, under California law, only if the city's legitimate interests in preserving the normal use of LAX can be vindicated "in no other way," *Hoffman,* 67 Cal.2d at 852, n.7, 434 P.2d at 857, n.7, 64 Cal.Rptr. at 101, n.7, may expressive activity be totally prohibited at the airport.

B. The District Court And Court Of Appeals Were Remiss In Deciding The Federal Constitutional Issue Prior To Considering California Public Forum Doctrine.

Hoffman and its progeny make clear that article I, section 2 of the California Constitution could have effectively

---

[24]For Amicus, at least, LAX is one of the few places "in which most of their fellow citizens can be found." *Lloyd Corp. v. Tanner,* 407 U.S. 551, 580-81 (1972) (Marshall, J. dissenting). Indeed, there is no other facility in Southern California that regularly accommodates such large numbers of people from various walks of life. In 1983, for example, LAX handled 33 million passengers, in addition to an equal number of "meeters" and "greeters." Stipulation of Facts, par.10; Jt. App. 9a. Accordingly, Amicus' need for access to this particular forum is incalculable.

provided a nonfederal state constitutional ground upon which to resolve the present controversy. Accordingly, regardless of whether the district court and court of appeals expressly addressed the California public forum question, which they should have, important policy concerns emanating from Article III of the Federal Constitution now require that the decision of the court of appeals be vacated and the case remanded with instructions to consider the state law question.

This result follows directly from the fundamental proposition that "[e]ven of cases unquestionably within this Court's subject-matter jurisdiction, we have disclaimed any pretension to reach federal questions arising under the Federal Constitution when an alternative basis of decision fairly presents itself." *Bender v. Williamsport Area School District*, 106 S.Ct. 1326, 1331 (1986) (No. 84-773); *accord, Jean v. Nelson*, 105 S.Ct. 2992, 2997 (1985) (No. 84-5240). Thus, "[p]rior to reaching any constitutional question, federal courts *must* consider non-constitutional grounds for decision." *Gulf Oil v. Bernard*, 452 U.S. 89, 99 (1981) (emphasis added).[25]

This rule is long-standing. In the seminal case of *Siler v. Louisville & Nashville R. Co.*, 213 U.S. 175 (1909),

---

[25]"It is a fundamental precept that federal courts are courts of limited jurisdiction" *Owen Equipment & Erection Co. v. Kroeger*, 547 U.S. 365, 374 (1978), which "have only the power that is authorized by Article III of the Constitution and the statutes enacted by Congress pursuant thereto." *Bender v. Williamsport Area School District*, 106 S.Ct. 1326, 1331 (1986) (No. 84-773). Consequently, "every federal appellate court has a special obligation to 'satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review,' even though the parties are prepared to concede it." *Id.*

the Court was faced with a variety of federal constitutional and state statutory challenges to an order of the Kentucky Railroad Commission fixing maximum railroad rates. In holding that the state questions should be decided first, and because these claims were dispositive the federal issues need not be reached, the Court articulated this rule:

> Where a case in this court can be decided without reference to questions arising under the Federal Constitution, that course is usually pursued and is not departed from without important reasons. In this case we think it much better to decide it with regard to the question of a local nature, involving the construction of the state statute and the authority therein given to the commission to make the order in question, rather than to unnecessarily decide the various constitutional questions appearing in the record.

Id. at 193.

Siler was cited with approval and incorporated by Justice Brandeis in his celebrated concurring opinion in *Ashwander,* which emphasized the importance of this policy as follows:

> The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of. . . . Thus, if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law the Court will decide only the latter.

297 U.S. at 347.

In *Hagans v. Lavine,* 415 U.S. 528 (1974), the Court also relied upon *Siler,* and noted that it "has characteris-

tically dealt first with possibly dispositive state law claims pendent to federal constitutional claims." *Id.* at 546. The Court further pointed out that many other Supreme Court decisions "have stated the general proposition endorsed in *Siler*—that a federal court properly vested with jurisdiction may pass on the state or local law question without deciding the federal constitutional issues—and have then proceeded to dispose of the case solely on the nonfederal ground." 415 U.S. at 546, n.12.

Siler, therefore, "is not an oddity." *Id.* at 546. On the contrary, "[i]f there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not pass on questions of constitutionality . . . unless such adjudication is unavoidable." *Spector Motor Service, Inc. v. McLaughlin*, 323 U.S. 101, 105 (1944).

Recent cases, moreover, confirm the continued vitality of this rule. In *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283 (1982), for example, the Court declined to review a municipal ordinance prohibiting children under 17 years of age from operating amusement devices unless accompanied by an adult, where the Texas constitution potentially provided an independent ground for the court of appeals' judgment striking down the restriction.[26] The Court stated:

> Finally, and of greater importance, is this Court's policy of avoiding the unnecessary adjudication of federal constitutional questions. As we recently have

---

[26]*City of Mesquite*, like the present case, involved a municipal "regulation" that was challenged under both the state and federal constitutions. 455 U.S. at 291.

> noted, see *Minnick v. California Dept. of Corrections,* 452 U.S. 105, 101 S.Ct. 2211, 68 L.Ed.2d 706, this self-imposed limitation on the exercise of this Court's jurisdiction has an importance to the institution that transcends the significance of particular controversies. No reason for hasty decision of the constitutional question presented by this case has been advanced. If Texas law provides independent support for the Court of Appeals' judgment, there is no need for decision of the federal issue.

Id. at 294. (footnote omitted).

The two essential ingredients of the *Silers-Hagan-Mesquite* policy are thus present here. First, jurisdiction over the state constitutional claim properly exists pursuant to the well-established requirements for pendent jurisdiction outlined in *United Mine Workers v. Gibbs,* 383 U.S. 715, 725 (1966). Second, an unambiguous, nonfederal right exists under the California Constitution which amply supports the status of LAX as a public forum, independent of the Federal Constitution.[27]

Accordingly, the time-honored "federal policy of avoiding constitutional adjudication where not absolutely essential to disposition of a case," *Hagans,* 415 U.S. at 546, n.12, should not be violated, and instead, the lead established in *Mills v. Rogers,* 457 U.S. 291 (1982), should be followed. There, the Court considered the issue of "whether an involuntarily committed mental patient has

---

[27]This Court has many times noted: "Within our federal system the substantive rights provided by the Federal Constitution define only a minimum. State law may recognize liberty interests more extensive than those independently protected by the Federal Constitution." *Mills v. Rogers,* 457 U.S. 291, 300 (1982).

a constitutional right to refuse treatment with antipsychotic drugs." *Id.* at 298-99. The case arose in the federal court system, and approximately five months after the court of appeals issued its decision, and shortly after the Court granted certiorari, the Supreme Judicial Court of Massachusetts decided a case[28] involving "the right of a noninstitutionalized but mentally incompetent person to refuse treatment with antipsychotic drugs." *Id.* at 300-01.

Although the Massachusetts' decision involved the rights of noninstitutionalized patients, and *Mills* concerned institutionalized mental patients, the mere possibility that state law might "influence the correct disposition of the case at hand," *id.* at 302-03, persuaded the Court to vacate the judgment of the court of appeals and remand for consideration of the state law question.

At a minimum, this procedure should be followed here. As in *Mills*, so here too, California undoubtedly "recognizes liberty interests . . . that are broader than those protected by the Constitution of the United States." *Id.* at 303.[29] Thus, the protection that the Federal Constitution affords against the abridgement of the right to free expression will "not determine the actual substantive rights and duties of persons in the State of [California]." *Id.*

In this circumstance, a decision on the federal public forum issue will transgress "the Court's settled policy to

---

[28]*Guardianship of Roe*, 383 Mass. 415, 421 N.E.2d 40 (1981).

[29]*See PruneYard Shopping Center v. Robins*, 447 U.S. 74, 81 (1980) (Supreme Court reasoning does not "limit the authority of the state to exercise its police power or its sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution.").

avoid unnecessary decisions on constitutional issues,"[30] as well as "the prohibition against advisory opinions." *Id.* at 305.[31] Accordingly, the judgment of the court of appeals should be vacated and the case remanded for consideration of the state law question.[32]

—o—

CONCLUSION

The question of whether important regional facilities such as publicly owned and operated airports constitute public fora is an issue of substantial national significance.

---

[30]Amicus do not concede that LAX is not a public forum under federal law. On the contrary, as argued extensively in the respondents' brief, LAX *is* a public forum under federal law. However, because of the concerns raised herein, the federal question need not be decided at the present time.

[31]In *Mills*, the Court cited *United States v. Hastings*, 296 U.S. 188, 193 (1935), in noting that "review of one basis for a decision supported by another basis not subject to examination would represent 'an expression of abstract opinion.'" 457 U.S. at 305. This is precisely the situation here regarding the California and Federal public forum question.

[32]This procedure was followed in *City of Mesquite*, as well as in *Three Affiliated Tribes v. Wold Engineering*, 467 U.S. 138 (1984) (No. 82-629), where the Court vacated a decision by the North Dakota Supreme Court that apparently rested on an erroneous conception of federal law, and remanded to that court for clarification. Although *Wold* arose in the state as opposed to federal court system, the same policy concerns which are at issue here were raised there: "It is a fundamental rule of judicial restraint . . . that this Court will not reach constitutional questions in advance of the necessity of deciding them . . . . This Court has relied on that principle . . . to resolve doubts about the independence of state law decisions in favor of an interpretation that avoids a constitution question." *Id.* at 157-58 (citations omitted). This same "prudential rule" *id.* at 158, should be employed in the present case.

It is only prudent, therefore, that the resolution of such a question, which will have a direct impact on the types of public facilities that may be made available for the exercise of First Amendment rights, be made on the best possible facts and circumstances. Unfortunately, such facts and circumstances do not exist in the present case.

The inadequacy of the present record upon which to posit a federal public forum decision is attributable to two primary factors: (1) the speculative and unenforceable nature of Resolution No. 13787; and (2) the existence of a prominent, nonfederal right of access to LAX under article I, section 2 of the California Constitution.

Thus, the judgment of the court of appeals should be vacated and the case remanded with instructions that the present action be dismissed, or, in the alternative, to consider the state constitutional question.

Respectfully submitted,

David M. Liberman
9806 Washington Boulevard
Culver City, California 90232
(213) 204-0488

Attorney for Amicus Curiae International Society for Krishna Consciousness of California, Inc.

APPENDIX A

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

(Filed June 29, 1984)

INTERNATIONAL SOCIETY FOR KRISHNA CONSCIOUSNESS OF CALIFORNIA, INC., *Plaintiff,* vs. CITY OF LOS ANGELES, A CALIFORNIA MUNICIPAL CORPORATION; EMMETT C. McCAUGHEY, President of the Los Angeles Board of Airport Commissioners; ELIZABETH K. ARMSTRONG, Vice-President of the Los Angeles Board of Airport Commissioners; and JOHNNIE L. COCHRAN, JR., MARY LOU CUNNINGHAM, and SAMUEL GREENBERG, members of the Airport Commission, *Defendants.*	NO. CV 83-5229-ER CV 84-0045-ER (Consolidated) ORDER DISMISSING CASE NO. CV 84-0045 FOR LACK OF SUBJECT MATTER JURISDICTION AND REMANDING CASE NO. 83-5229 AS IMPROVIDENTLY REMOVED
CITY OF LOS ANGELES; THE BOARD OF AIRPORT COMMISSIONERS OF THE CITY OF LOS ANGELES, *Plaintiffs,*	

vs.)
)
THE INTERNATIONAL)
SOCIETY FOR KRISHNA)
CONSCIOUSNESS OF)
CALIFORNIA, INC.;)
INTERNATIONAL CAUCUS OF)
LABOR COMMITTEES; FUSION)
ENERGY FOUNDATION;)
SOLDIERS OF THE CROSS)
OF CHRIST; NATIONAL)
ANTI DRUG COALITION,)
)
Defendants.)
)
)

On June 11, 1984, the Motion for Summary Judgment of City of Los Angeles requesting declaratory and injunctive relief in both of the above-captioned consolidated matters came on for hearing. Robert C. Moest, attorney for the International Society for Krishna Consciousness, David L. Llewellyn, Jr., attorney for the Soldiers of the Cross of Christ; and Jeffrey S. Cohen, attorney for the Fusion Energy Foundation, National Anti-Drug Coalition and the International Caucus of Labor Committees opposed the City's Motion for Summary Judgment. James R. Kapel represented the City parties.

Upon consideration of the papers submitted by the parties, the file in this case, their oral argument, and its own research, this Court does not find it possible to reach the merits presented by the summary judgment motion. For the reasons set out below, this Court has determined that it does not have subject matter jurisdiction over Case No. 84-0056-ER. This Court does not have jurisdiction

over Case No. 83-5229-ER because there is no live controversy.

BACKGROUND

The first of the two consolidated cases was filed by the International Society of Krishna Consciousness ("ISKCON") against the City. It was filed in state court on July 18, 1983, removed to the federal court August 12, 1983, and a first amended complaint was filed October 24, 1983. The complaint alleges that a resolution passed by the Board of Airport Examiners forbidding "First Amendment activities by any individual and/or entity" at the Central Terminal Area of the Los Angeles International Airport ("LAX")[1] violates the first amendment of the federal constitution, § 1983, and article 1, §§ 2, 4, and 7 of the California constitution. Plaintiff seeks declaratory and injunctive relief. The City filed the second lawsuit against ISKCON, the International Caucus of Labor Committees, Fusion Energy Foundation, the National Drug Coalition, and the Soldiers of the Cross of Christ. The City seeks a declaration that the resolution is constitutional and that the listed defendants are violating the resolution, and an injunction forbidding them from violating the resolution in the future.

DISCUSSION

Does this Court have Subject Matter Jurisdiction Over the City's Suit for Declaratory and Injunctive Relief?

The City claims that this Court has federal question jurisdiction over its suit, pursuant to 28 U.S.C. § 1331 (1984). But a federal court does not have federal question jurisdiction over a case in which the plaintiff is suing

on a state law cause of action and the federal question only arises by way of the defendant's defense or by the plaintiff's rebuttal to the defendant's defense. Applying that principle to the present case, all that the City would need to prove in an affirmative suit would be that the defendant(s) violated a *state law*. That the law is constitutional would only come in as a response to defendant's objection that the state law is unconstitutional.

The Supreme Court recently dealt with this very issue.[2] *Franchise Tax Board v. Construction Laborers Vacation Trust*, — U.S. —, 103 S.Ct. 2841 (1983), the Court posed the question whether a suit for a declaratory judgment that a state law was consistent with ERISA arises under federal law and answered the question as follows:

> We think not. We have always interpreted what *Skelly Oil* called "the current of jurisdictional legislation since the Act of March 3, 1875," 339 U.S., at 673, 70 S.Ct., at 879, with an eye to practicality and necessity. "What is needed is something of that common-sense accommodation of judgment to kaleidoscopic situations which characterizes the law in its treatment of causation . . . a selective process which picks the substantial causes out of the web and lays the other ones aside." *Gully v. First National Bank*, 299 U.S., at 117-118, 57 S.Ct., at 99-100. *There are good reasons why the federal courts should not entertain suits by the States to declare the validity of their regulations despite possibly conflicting federal law.* States are not significantly prejudiced by an inability to come to federal court for a declaratory judgment in advance of a possible injunctive suit by a person subject to federal regulation. They have a variety of means by which they can enforce their own laws in their own courts, and they do not suffer if the pre-

> emption questions such enforcement may raise are tested there.

Id. at 2852 (footnotes omitted) (emphasis added).

The City's reply brief unintentionally supports the argument that it is not raising any federal question, except as a defense. The City states:

> There can be no doubt that the controversy between the parties arises out of the federal constitutional and statutory law as well as involving state issues. All of the defendants have claimed that they have federally protected rights to conduct their distribution and soliciting activities in the terminal facilities at LAX.

City's Reply Brief at 25-26.

The Court has not discovered, nor have the parties cited, a single case brought by a state, city or federal government seeking, before the law is enforced, a declaratory judgment that a law is constitutional, with the exception of *Muskrat v. United States*, 219 U.S. 346 (1911). *Muskrat* established the longstanding precedent that a federal court will not, before the law is applied, declare laws to be constitutional, because by doing so the court would issue advisory opinions.

The City contends that the consolidation saves it from dismissal. "The City's position as plaintiff in this second case, rather than as a Cross-Complainant joining other necessary and interested parties, is merely because the second, separate suit was the easiest way to bring all necessary parties before the Court." City's Reply Brief at 26. But, the other groups are not necessary parties for ISKON's (sic) suit that the resolution is unconstitutional as applied to ISKCON and on its face because only

ISKCON would be bound by the ruling if it were unfavorable.[3]

Consolidation poses neither a practical nor a theoretical problem. All the circuits which have considered the question have said that consolidated cases retain their separate identities. *Robinson v. Worthington,* 544 F. Supp. 949 (N. D. Ala. 1982) recites the applicable law:

> A review of the law concerning consolidation quickly disabused the Court of the notion that actions somehow lose their separate identity upon consolidation. The ruling of the Supreme Court in regard to consolidation prior to the adoption of Rule 42(a) is still regarded as authoritative:
>
> > "Consolidation is permitted as a matter of convenience and economy in administration, but does not merge the suits into a single cause, or change the rights of parties, or make those who are parties in one suit parties in another." *Johnson v. Manhattan Railway Co.,* 289 U.S. 429, 496, 497, 53 S.Ct. 721, 727, 77 L.Ed. 1331 (1933).
> >
> > "Thus the Courts hold that actions do not lose their separate identity because of consolidation."

Id. at 952 (citations omitted).

Therefore, the City's suit for declaratory and injunctive relief is dismissed for lack of subject matter jurisdiction for want of a federal question.

Does the Suit by ISKCON Raise a "Case of Controversy["] Such That This Court Possesses Jurisdiction?

The jurisdiction of federal courts is limited to the adjudication of "cases or controversies" by Art. III, § 2, of the Constitution. The Declaratory Judgment Act, 28 U.S.C. § 2201 aplies only to cases of actual controversy." Thus,

> "the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273, 61 S.Ct. 510, 512, 85 L.Ed. 826 (1941).

quoted in Western Mining Council v. Watt, 643 F.2d 618, 624 (9th Cir. 1981).

The standard is heightened by the fact that the plaintiffs seek to have this Court declare the resolution unconstitutional and enjoin its enforcement.[4] In such a case, it is especially important that the Court is certain that there is an actual case or controversy between the parties, as the Supreme Court explained in *Poe v. Ullman*, 367 U.S. 497 (1961) (no case or controversy in suit seeking declaratory judgment on constitutionality of law banning sale of contraceptives when no indication that law would be enforced).

> These considerations press with special urgency in cases challenging legislative action or state judicial action or state judicial action as repugnant to the Constitution. "The best teaching of this Court's experience admonishes us not to entertain constitutional questions in advance of the strictest necessity." . . . *[f]ederal judicial power is to be exercised to strike down legislation, whether state or federal, only at the instance of one who is himself immediately harmed, or immediately threatened with harm, by the challenged action. . . . "This court can have no right to pronounce an abstract opinion upon the constitutionality of a State law. Such a law must be brought into actual or threatened operation upon rights properly*

> *falling under judicial cognizance, or a remedy is not to be had here.*

367 U.S. at 503 (citations omitted) (emphasis added).

The Supreme Court stated the mere existence of a panel statute constitutes insufficient grounds for an adjudication of its merit if "real threat of enforcement is wanting.["] *Id.* at 507. *See also Western Mining Council,* 643 F.2d at 627.

Furthermore, events can render moot actions which once presented a case or controversy. "Simply stated, a case is moot when the issues presented are no longer 'live' or when the parties lack a legally cognizable interest in the outcome." *Powell v. McCormack,* 395 U.S. 486, 496 (1969). As the Supreme Court instructed the district court in *Ellis v. Dyson,* 421 U.S. 426 (1975):

> The district court will find it desirable to examine the current enforcement scheme in order to determine whether, indeed, there is now a credible threat that petitioners . . . might be arrested and charged with loitering. A genuine threat must be demonstrated if a case or controversy, within the meaning of Article III of the [C]onstitution and of the Declaratory Judgment Act, may be said to exit [sic]. . . . Further, the credible threat must be shown to be alive at each stage of the litigation.

421 U.S. at 434 (citations omitted).

ISKCON argues that there is no present case or controversy before this Court. Its amended complaint alleged that immediately after the resolution was passed, airport officials distributed copies of the resolution to ISKCON members and members of the public. While this may have created a case or controversy when this case was filed,

there is none now. ISKCON states that its members have not been harrassed by airport officials. Additionally, the Los Angeles City Charter provides that the airport board "shall have power. . . . to make and enforce all necessary rules and regulations governing the use and control of all municipal airports within the City of Los Angeles." City Charter Art. XXIV, § 239. The provision goes on to state that "said regulations shall be approved by the Council by ordinance which shall prescribe the penalties for the violation of such rules and regulations." Section 239.2(1) states that the general manager of the airport department "shall have the power and duty to enforce all orders, rules and regulations adopted by the Board." The charter does not provide for the Board to pass *resolutions*, as it has in this case. Nor has the City Council ratified the Board's resolution.

Further evidence that there is not case or controversy "of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Maryland Casualty Co.*, 312 U.S. 270, is found in the City's answer to ISKCON's complaint. The city states "defendants, and each of them, deny that Resolution No. 13787 adopted by the Board has been enforced against the plaintiff or against anyone: ¶ 5, and "defendants, and each of them, allege that pursuant to City Charter § 239 all rules must be approved by the City Council." ¶ 6.

The City does not substantively address this argument in its reply, except to cite the standard and to observe that ISKON initiated the suit. That does not change the preceding analysis—the requirement of an actual controversy is jurisdictional and as such, can be raised by any party or the Court sua sponte at any time.

This Court finds that the question whether the resolution violates the first amendment is not an actual case or controversy. There is not sufficient adversity between the parties to make determination of the federal constitutional question appropriate. This case was therefore improvidently removed and must be remanded to state court.

DATED: June 29, 1984.

/s/ Edward Rafeedie
United States District Judge

FOOTNOTES

1. The Board adopted the resolution July 13, 1983. It stated in pertinent part:

> NOW, THEREFORE, BE IT RESOLVED by the Board of Airport Commissioners that *the Central Terminal Area* at Los Angeles International Airport *is not open for First Amendment activities by any individual and/or entity:*
>
> BE IT FURTHER RESOLVED that the Central Terminal Area at Los Angeles International Airport is only to be used for the promotion and accommodation of air commerce and air navigation or uses incidental thereto unless the Board of Airport Commissioners makes the appropriate findings pursuant to Charter Section 238.8 that a portion of said area is not currently required for the promotion or accommodation of air navigation or uses incidental thereto; and
>
> BE IT FURTHER RESOLVED that after the effective date of this Resolution, *if any individual and/or entity seeks to engage in First Amendment activities within the Central Terminal Area* at Los Angeles International Airport, *said individual and/or entity shall be deemed to be acting in contravention of the stated policy of the Board of Airport Commissioners* in reference to the uses permitted within the Central Terminal Area at Los Angeles International Airport; and
>
> BE IT FURTHER RESOLVED that if any individual or entity engaged in First Amendment activities within the Central Terminal Area at Los Angeles International Airport, the City Attorney of the City of Los Angeles is directed to institute appropriate litigation against such individual and/or entity to ensure compliance with this policy statement of the Board of Airport Commissioners; and

> BE IT FURTHER RESOLVED if any entity or individual seeks to engage in First Amendment activities in the vicinity of the Central Terminal Area, those activities must be conducted only on the sidewalks in front of the ticketing buildings and in such a manner so as to not interfere with other persons.

(Emphasis added.)

2. The precise question in *Franchise Tax Board* was whether a case was properly removed from state court. The federal question analysis, however, is the same in both removed cases and cases originally brought in federal courts.

3. The procedural problems which would accompany the City's suit for a declaratory judgment support declining to issue such declarations. "All persons who have an interest in the determination of the questions raised in a declaratory judgment suit should be before the Court." *Diamond Shamrock Corp. v. Lumberman's Mutual Casualty Co.*, 416 F.2d 707, 710 (7th Cir. 1969). The City lists other organizations besides the five named defendants who requested permission to solicit at LAX, and the defendants have mentioned still more groups who they claim have solicited at LAX. These other groups would surely be interested parties in a case brought by the City to prove that the law is unconstitutional, yet they are not parties in this action. Including all interested parties would make this an unmanageable lawsuit. But, unless such groups are included, they would not be bound by the resolution of this case. Were the Court to find the resolution constitutional, this issue would have to be litigated again if the resolution were enforced against nonparties and they contested the constitutionality.

4. Were the City the party arguing that no controversy exists, the Court's determination could differ. When a defendant has enforced a statute in the past, or has reasonably threatened to enforce it, the defendant normally has a heavy burden showing that it will not enforce the law in the future. *See Rabinowitz v. Board of Junior College,* 507 F.2d 1255 (7th Cir. 1974). But here ISKCON—who brought the suit—states that it is not worried about prosecution, which strongly indicates that there is no case or controversy. Indeed, at oral argument the City's attorney stated that the City wanted a ruling on the constitutionality of the resolution and a determination whether LAX was a public forum before enforcing the resolution.

APPENDIX B

ARTICLE XXIV
DEPARTMENT OF AIRPORTS

(Formerly entitled, "Department of Trusts"; repealed, and new article added, 1947.)

Sec. 238. There is hereby established a Department of Airports (hereinafter in this article referred to as the Department) to be under the management and control of a board of five commissioners to be known as the Board of Airport Commissioners (hereinafter referred to as the Board), to which the provisions of Article VI of this charter shall apply insofar as applicable. (Added, 1947.)

Sec. 238.1. (Repealed, 1973.)

Sec. 238.2. (Repealed, 1973.)

Sec. 238.3. Such department shall have control of its own revenues or funds, and expenditures of all bond funds relating to its facilities or activities. (Added, 1947.)

Sec. 238.4. The Board shall have possession, management, charge, superintendence and control of all airports, airport sites, and all equipment, accommodations and facilities for aerial navigation, flight, instruction and commerce belonging to or pertaining to this city; and such other property as it may acquire or which shall be placed under its control. (Added, 1947.)

Sec. 238.5. The Board shall fix, regulate and collect rates or charges for the use of all buildings, grounds, facilities, utilities and structures, which are owned, controlled or operated by the city in connection with or for the promotion or the accommodation of air commerce and air

navigation; and for services in connection therewith. (Added. 1947.)

Sec. 238.6. The Board shall regulate and control all concessions, public service and public utilities operated upon or in any airport under its control in connection with, or for the promotion of air commerce or air navigation, or in connection with the municipal facilities therefor, and shall fix the fees to be paid to the city by any person, firm, or corporation operating any such public service or utility; and shall fix and regulate the toll or rates to be charged or collected for services furnished by any such public service or utility. The Board shall have the right, at all reasonable times, to have access to examine the books, papers, maps, and records showing the affairs, transactions, property, and financial condition of such persons, firms or corporations, which said examination may be made by the members of the Board, examiners of the Board, or any other duly authorized representative; and to require reports respecting such matters from such persons, firms or corporations at such times and in such form as the Board may prescribe. The Board by order, subject to approval, change or modification by the Council by ordinance, may fix the amount of license fees to be paid to the city by any such person, firm or corporation operating any such public service or utility, and the rates or terms to be charged and collected for commodities or services furnished or supplied by such public service or utility. (Added. 1947.)

Sec. 238.7. The Board shall have the power to purchase, lease, acquire, design, erect, maintain, improve, repair and operate all such property, improvements, utilities, equipment, supplies, machinery, aircraft, watercraft, vehicles, appliances, or facilities as it may deem necessary

or convenient for the promotion and accommodation of air commerce and air navigation; for manufacture or repair of devices therefor; or for use in connection therewith. (Added 1947)

> Construction and leasing of hangars on a municipal airport to private persons and corporations for manufacturing and other work on aircraft is not the use of public funds for a private purpose in violation of Article I, Section 14 of the State Constitution.
> *Pipes v. Hilderbrand,* 110 Cal. App. (2d) 645, 648.

Sec. 238.8. The Board shall have power to grant franchises, permits and licenses to, and to enter into leases with, any person, firm or corporation, or agency of the government for the use of any municipally owned or controlled airport or any part of facility thereof, for the promotion and accommodation of air commerce and air navigation, or use incidental thereto, together with the right to use said airport in common with others as necessary to the right granted. (Amended, 1951.)

The Board shall likewise have power to enter into leases with any person, firm or corporation for purposes other than for the promotion and accommodation of air commerce and air navigation covering any portion of the airport property whenever the Board shall determine that the use of such portion of the Airport property is not necessary for the promotion and accommodation of air commerce and air navigation or use incidental thereto. (Added, 1951.)

Sec. 238.9. All such franchises, permits, licenses and leases shall be granted and entered into subject to such terms and conditions and such rentals or compensation as

the Board in its discretion may prescribe. Every such franchise, permit, license or lease granted or entered into for a definite period of time shall be made by order and if made for a period of five (5) years or less such order shall be published once in the same manner as ordinances of the City, and shall take effect upon such publication. If made for a longer period than five years the same shall be submitted to the Council for its approval or disapproval. Action must be taken thereon by the Council within sixty (60) days after such franchise, permit, license or lease shall have been submitted to it. If the Council shall approve the same, the order granting such franchise, permit, license or lease shall thereupon be published once in the same manner as ordinances of the City; if the Council shall fail to disapprove any such franchise, permit, license or lease within said period of sixty days, the order granting such franchise, permit, license or lease shall thereupon be published once in the same manner as ordinances of the City. Every such order granting a franchise, permit, license or lease for a period of time greater than five years shall, before the same becomes effective, be subject to the referendum provisions of this charter relating to ordinances. (Amended, 1983.)

No such franchise, permit, or license shall be made for a term or period greater than fifty (50) years, nor shall any such lease be made for a term or period greater than the term permitted by state, or for ninety-nine (99) years, whichever is less, and any such franchise, permit, license, or lease shall be subject to a readjustment of the rental compensation at least every ten (10) years during the term thereof upon such procedure as shall be prescribed in the instrument granting such franchise, permit, license or lease. (Amended, 1983.)

Secs. 238.10-238.11 Inclusive. (Repealed, 1951.)

Sec. 239. The Board shall have power and it shall be its duty, subject to the powers of the United States respecting commerce, to make and enforce all necessary rules and regulations governing the use and control of all municipal airports located within the City of Los Angeles, or upon any of its property wherever located, and the use of airways and waterways proximate thereto incident to aerial navigation. Said regulations shall be approved by the Council by ordinance which shall prescribe the penalties for the violation of such rules and regulations.

Such regulations may embrace but are not limited to:

(a) The ascent, landing, mooring, movement, maintenance, operation or use of all apparatus for aerial navigation and flight, or convenient or necessary in connection therewith.

(b) The design construction, maintenance, use, condition and operation of all and any utility, machine, building, structure, improvement or appliance on any airport under its jurisdiction; and control of excavation, obstructions and traffic on or in said airports. (Sec. added, 1947.)

Sec. 239.1. (Repealed, 1973.)

Sec. 239.2. The general manager of the Airport Department, in addition to the powers and duties which are or may be conferred upon him as elsewhere provided in this charter, shall have the power and it shall be his duty: (Added, 1947.)

(1) To enforce all orders, rules and regulations adopted by the Board relating to the regulation, operation

or control of the funds, facilities, properties and apparatus of said department; (Added 1947.)

(2) To supervise and manage the design, construction, maintenance and operation of all work or works authorized or ordered by the Board and to that end the Board shall have power to delegate to him such necessary powers and duties as are by this charter conferred upon said Board. (Added, 1947.)

Sec. 239.3. The general manager shall have power to designate and assign space for the use of aircraft at any airport owned, controlled or operated by the city, at the duly established rates or charges for the use of such municipal facilities and subject to the rules and regulations governing the same; and to designate and assign space in any warehouse, shop, field, runway, hangar or like facility operated by the city at the duly established rates or charges for the use of such municipal facilities and subject to the rules and regulations governing the same. Every such assignment of space shall be in writing and shall reserve to the city the right to use such space or facility for general airport or other purposes when such space is not required for the use of the permittee or lessee. (Added, 1947.)

Sec. 239.4. Every such assignment of space shall be revocable by the general manager without compensation to the lessee or permittee upon due notice to be stated therein, such notice in no case to exceed one year. (Added, 1947.)

Sec. 239.5. Whenever it shall be determined by the Board by order that certain parts of any airport owned, operated or controlled by the city may not be required at such time for use in connection with, or for the promotion

and accommodation of air commerce and air navigation, the general manager shall have power to issue revocable permits to use limited portions of such space for any and all purposes which shall not interfere with air commerce or air navigation and not inconsistent with any trust upon which such land may be held by the City of Los Angeles. Every such permit shall first be approved by the Board and shall prescribe that it shall be revocable, without compensation to the lessee or permittee, upon due notice to be stated therein, such notice in no case to exceed one year. (Added, 1947.)

Sec. 239.6. Every such assignment of space or revocable permit shall be made in writing or printing which shall set forth the terms and conditions thereof. (Added, 1947.)

Sec. 239.7.

The Board shall have power to order and contract for the expenditure of all money derived from the sale of bonds of the City issued for airport improvements, and of all money in the Airport Revenue Fund. Whenever the Board shall have approved and authorized any work or improvement, and shall have appropriated the necessary money therefor, the general manager shall have power to let any necessary contract in connection with such work or improvement. In cases of emergency where the circumstances render it impossible to secure bids for the furnishing of labor or materials without undue delay or loss to the City, the general manager may, with the approval of the Board, let such contract without advertising for bids. (Amended, 1977.)

Notwithstanding any other provision of this Charter, the requirement for security deposits including surety bonds and faithful performance bonds and annual bid bonds as prescribed elsewhere in this Charter may, in the general manager's discretion, be omitted when letting contracts for purchases of materials, supplies and equipment, and for the rental, repair and maintenance thereof. (Sec. title deleted, 2nd par. added, 1982.)

Sec. 239.8. Airport Revenue Fund.

There is hereby established the Airport Revenue Fund, the depository for which shall be the City Treasury. Said fund shall be exempt from the provisions of Section 382 of this Charter and shall be maintained separate and apart from all other funds and accounts in the City Treasury. The Airport Revenue Fund shall consist of: (a) all funds, moneys, securities, credits and other evidences of indebtedness in the present Airport Fund and all

* * *

Supreme Court, U.S.
FILED
JAN 8 1987
JOSEPH F. SPANIOL, JR.
CLERK

NO. 86 - 104

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

o

THE BOARD OF AIRPORT COMMISSIONERS OF
THE CITY OF LOS ANGELES, ET AL.,

Petitioners,

vs.

JEWS FOR JESUS, INC.
AND ALAN HOWARD SNYDER,
a/k/a AVI SNYDER,

Respondents,

o

ON WRIT OF CERTIORARI: TO THE
UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT

o

BRIEF OF JESUS PEOPLE U.S.A. FULL GOSPEL MINISTRIES AMICUS CURIAE ON BEHALF OF RESPONDENT, JEWS FOR JESUS, INC. AND AVI SNYDER

o

COUNSEL FOR AMICUS CURIAE

JOHN W. MAUCK
FRIEDMAN & MAUCK
7 SOUTH DEARBORN STREET
SUITE 1207
CHICAGO, ILLINOIS 60603
312/782-8188

INTEREST OF AMICUS CURIAE

Jesus People, U.S.A. Full Gospel Ministries ("Jesus People") is an Illinois not - for - profit corporation incorporated in 1973. The members of the corporation live as a community in the "uptown" area of Chicago, which is one of the poorest areas of the inner-city, and commit themselves to a life of service to the Lord with particular emphasis on helping the poor, feeding the hungry and housing the homeless. As part of the expression of the faith of the Jesus People Community, members communicate to others that by trusting in Jesus, individuals can experience true peace in this life and an eternal life with God. This expression is integral to the faith of the Jesus People just as it is to the Jews for Jesus. One means of communication used by the Jesus People is the distribution of free religious literature by members to the public on a person-to-person, face-to-face basis which involves a member going to a public place and offering literature to people who may be walking nearby. The distribution of free religious literature by the Jesus People has taken place on streets, on sidewalks, in parks, outside of arenas and auditoriums, in airports, shopping centers, and other public areas in the Chicago area.

SUMMARY OF ARGUMENT

The freedoms of Americans to communicate with each other should not be diminished because of changes in architecual design or the evolution of building patterns, or because increased wealth enables governemts to enclose public ways.

ARGUMENT

As new buildings have been erected in Chicago it has become apparent that more and more buildings are "self-contained" (with working facilities, restaurants and shops within the same enclosed office building), and that to an even greater degree, buildings are being linked together by underground or aboveground passage ways, both heated and unheated. Because weather conditions in Chicago are particularly severe in the winter (large snowfalls, bitter cold and high wind chill

factors) and long periods of rain in the spring, early summer and fall, more and more people have been utilizing the self-contained and inter-connected buildings rather than travel outdoors. Also, shopping patterns are shifting. Rather than travel to several stores, people shop at one enclosed mall containing many stores. Likewise, all of the terminals at O'Hare airport have been linked together by above ground and underground enclosed pedestrian walkways so that individuals do not need to walk outside to travel from one terminal to another. In fact, due to architectural configurations, it is more convenient for people to walk between terminals via enclosed passageways than to go outside and walk on an unenclosed sidewalk.

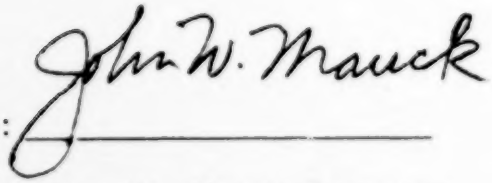
The effect of determining that airports and other public transporation terminals are not "public forums" would be to deprive the Jesus People, and many other groups, of a significant area in which to communicate their beliefs. Millions of citizens will be deprived of an opportunity to consider whether they can be reconciled to God through faith in Christ (and to consider important messages from other groups). Those who do not wish to consider the message being communicated, through the free religious literature handed out by the Jesus People, need only refuse the offer of literature.

Finally, the Jesus People are part of a small religious denomination. Such groups as it, independent political groups and others desiring to communicate with the public, frequently do not have the ability to purchase television time or large computerized mailing lists. The effect of limiting the access of the public to divergent opinions in religious, political, economic, cultural, social, or commercial areas, is inevitably to concentrate power into the hands of those groups which can command large or majority followings. The religious dissenter, the political maverick, the culturally offbeat and the small entrepreneur will alike be pushed toward conformity or extinction in a sterile America.

CONCLUSION

The opinion of the Ninth Circuit should be affirmed.

FRIEDMAN & MAUCK

Dated: December 30, 1986 By: 

John W. Mauck, attorneys
for Jesus People U.S.A. Full
Gospel Ministries

Friedman & Mauck
7 South Dearborn
Suite No. 1207
Chicago, Illinois 60603
312/782-8188

Supreme Court, U.S.
FILED
JAN 10 1987
CLERK

No. 86-104

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

THE BOARD OF AIRPORT COMMISSIONERS
OF THE CITY OF LOS ANGELES, *et al.*,
Petitioners,

v.

JEWS FOR JESUS, INC., AND ALAN HOWARD SNYDER,
a.k.a AVI SNYDER
Respondents.

**On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit**

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

MARSHA S. BERZON
177 Post Street
San Francisco, CA 94108

LAURENCE GOLD
(Counsel of Record)
815 16th Street, N.W.
Washington, D.C. 20006
(202) 637-5390

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

	Page
ARGUMENT	2
INTRODUCTION AND SUMMARY	2
I. THE PUBLIC AREAS OF THE LAX TERMINAL CONSTITUTE A QUINTESSENTIAL PUBLIC FORUM	8
A. A Quintessential Public Forum Is Defined By The Use of the Location for Expressive Activities, Not By It's "Principal Purposes" or By The Government's "Dedication" of The Location to Expression	9
B. Airport Terminal Facilities Are Quintessential Public Forums	14
II. EVEN IF THE LAX TERMINAL IS NOT A QUINTESSENTIAL PUBLIC FORUM, THE TOTAL BAN UPON CERTAIN PEACEFUL, NONOBSTRUCTIVE COMMUNICATIVE ACTIVITY IS INVALID BECAUSE SUCH A BAN DOES NOT SERVE IMPORTANT GOVERNMENTAL INTERESTS UNRELATED TO THE SUPPRESSION OF EXPRESSION IN A MANNER THAT WORKS NO GREATER RESTRICTION ON EXPRESSION THAN IS ESSENTIAL TO FURTHER THE GOVERNMENTAL INTEREST	19
CONCLUSION	27

TABLE OF AUTHORITIES

Cases: Page

Amalgamated Food Employees v. Logan Valley Plaza, 391 U.S. 308 (1968) 10
Brown v. Glines, 444 U.S. 348 (1980) 24
Carroll v. President and Commissioners of Princess Anne, 393 U.S. 175 (1968) 12
Chicago Area Military Project v. City of Chicago, 508 F.2d 921 (7th Cir. 1975) 15, 17
City Council v. Taxpayers For Vincent, 466 U.S. 789 (1984) ..... *passim*
Cornelius v. NAACP Legal Defense and Educational Fund, Inc., 473 U.S. ——, 53 U.S.L.W. 5116 (1985) ..... *passim*
Cox v. Louisiana, 379 U.S. 536 (1965) 3, 11, 12
Cox v. New Hampshire, 312 U.S. 569 (1941) 10, 19
Davis v. Massachusetts, 167 U.S. 43 (1897) 9, 12, 22
Fernandes v. Limmer, 663 F.2d 619 (5th Cir. 1981) *cert. dismissed*, 458 U.S. 1124 (1982) 14, 15
Grayned v. City of Rockford, 408 U.S. 102 (1972) 10, 12, 13, 18
Greer v. Spock, 424 U.S. 828 (1976) 24
Hague v. CIO, 307 U.S. 496 (1939) ..... *passim*
Heffron v. International Society for Krishna Consciousness, 452 U.S. 640 (1981) 13, 18, 19
Hudgens v. NLRB, 424 U.S. 507 (1976) 23
International Society for Krishna Conciousness Inc. v. Eaves, 601 F.2d 809 (5th Cir. 1979) 15
Jamison v. Texas, 318 U.S. 413 (1943) 12
Jews for Jesus, Inc. v. Board of Airport Commissioners, 785 F.2d 791 (9th Cir. 1986) 2
Kunz v. New York, 340 U.S. 290 (1951) 10
Kuszynski v. City of Oakland, 479 F.2d 1130 (9th Cir. 1973) 15
Lehman v. City of Shaker Heights, 418 U.S. 298 (1974) 24, 25
Martin v. City of Struthers, 319 U.S. 141 (1943) 12
Niemotko v. Maryland, 340 U.S. 268 (1951) 11
NLRB v. Babcock & Wilcox, 351 U.S. 105 (1956) 23
Perry Education Association v. Perry Local Educators Ass'n, 460 U.S. 37 (1983) 7, 10, 11, 20, 24, 25

TABLE OF AUTHORITIES—Continued

Page

Pruneyard Shopping Center v. Robins, 447 U.S. 74 (1980) 23
Republic Aviation v. Labor Board, 324 U.S. 793 (1945) 23
Rosen v. Port of Portland, 641 F.2d 1243 (9th Cir. 1981) 15
Schneider v. New Jersey, 308 U.S. 147 (1939) 11, 13
Schad v. Borough of Mount Ephraim, 452 U.S. 61 (1981) 4
United States v. Grace, 461 U.S. 171 (1983) 9, 10, 12
United States v. O'Brien, 391 U.S. 367 (1968) 8, 21, 26
United States Postal Service v. Greenburgh Civic Ass'n, 453 U.S. 114 (1981) 24, 25
United States Southwest Africa/Namibia Trade & Cultural Council v. United States, 708 F.2d 760 (D.C. Cir. 1983) 14, 15, 18
Valentine v. Christiansen, 316 U.S. 52 (1942) 11
Wolin v. Port of New York Authority, 392 F.2d 83 (2d Cir. 1968) 15, 16, 17

Constitutional Provisions:

First Amendment to the Constitution of the United States ..... *passim*

Regulations:

45 Fed. Reg. 35,314 (1980) 17
14 C.F.R. §§ 159.91-94 (1982) 17

Other Authorities:

Farber & Nowak, *Misleading Nature of Public Forum Analysis: Content and Context in the First Amendment Adjudication*, 70 Va. L. Rev. 1219 (1984) 4
Kalven, *The Concept of the Public Forum: Cox v. Louisiana*, 1965 S.Ct. Rev. 113 ..... 4, 10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-104

THE BOARD OF AIRPORT COMMISSIONERS
OF THE CITY OF LOS ANGELES, *et al.*,
Petitioners,

v.

JEWS FOR JESUS, INC., AND ALAN HOWARD SNYDER,
a.k.a AVI SNYDER
Respondents.

**On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit**

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

The American Federation of Labor and Congress of Industrial Organizations, a federation of 91 national and international labor organizations with a total membership of 13,000,000 working men and women, files this brief *amicus curiae* with the consent of the parties as provided for in the Rules of this Court.

ARGUMENT

INTRODUCTION AND SUMMARY

The Los Angeles International Airport ("LAX")—a public facility established by the City of Los Angeles and operated by the City's Board of Airport Commissioners—opens its terminals to all members of the general public, including those "who have no purpose or desire to use the transportation facilities within the terminal areas". Jt. App. 13a. The Airport "[does] not attempt to restrict . . . walking, reading, shopping, eating, drinking [or] conversing with other members of the general public in the interior of terminal areas at LAX." *Id.* Nonetheless, the Airport Commissioners *do* claim the right to prevent entirely some forms of peaceful, nonobstructive communication by individuals otherwise legally on the premises.

Against that background it is difficult to divine precisely what expressive activity the Airport seeks to ban. On the one hand, the Resolution under which respondents were ejected from the airport reads as follows:

> Now, therefore Be it Resolved by the Board of Airport Commissioners that the Central Terminal Area at Los Angeles International Airport *is not open for First Amendment activities by any individual and/or entity*; . . .
>
> Be it Further Resolved that if any individual or entity engages in First Amendment activities within the Central Terminal Area at Los Angeles International Airport, the City Attorney of the City of Los Angeles is directed to institute appropriate litigation against such individual and/or entity to ensure compliance with this policy statement of the Board of Airport Commissioners. [*Jews for Jesus, Inc. v. Board of Airport Commissioners*, 785 F.2d 791, 792 (9th Cir. 1986); emphasis added.] [1]

---

[1] The reason this citation is to the Court of Appeals opinion is that the Airport Commissioners nowhere include the language of the Resolution in their Petition or Brief. Rather, petitioners provide

Not surprisingly, however, the Airport makes no attempt, despite the breadth of this language, to defend a right to entirely suspend the First Amendment at its terminal doors.[2] For "First Amendment activities" are not some

---

only a "summary" of their policy (Brief for Petitioners ("Pet. Br.") at 3); that "summary", unlike the actual Resolution, suggests that the ban is not on *all* First Amendment activity, but only upon non-airport related speech or literature.

[2] The lack of fit between petitioners' officially promulgated policy and the one actually pursued in practice provides sufficient grounds for deciding this case in respondents' favor. In effect, petitioners are leaving the decision whether citizens otherwise legally present at the Airport are to be ousted because of their expressive activity to the discretion of the Airport management, unguided by any properly adopted regulation specifying which expressive activities by members of the public are to be permitted and which prohibited. "The situation is thus the same as if the [regulation] itself expressly provided that there could only be [First Amendment activities] in the unbridled discretion of the [Airport] officials." *Cox v. Louisiana*, 379 U.S. 536, 557 (1965). As *Cox* went on to note:

> The pervasive restraint on freedom of discussion by the practice of authorities [in such a situation] is not any less effective than a statute expressly permitting such selective enforcement. A long line of cases in this Court makes it clear that a State or municipality cannot "require all who wish to disseminate ideas to present them first to police authorities for their consideration or approval, with a discretion in the police to say some ideas may, while others may not, be . . . disseminated . . ." *Schneider v. New Jersey*, [308 U.S. 147, 152]. See *Lovell v. City of Griffin*, [303 U.S. 444]; *Hague v. CIO*, [307 U.S. 496]; *Largent v. State of Texas*, [318 U.S. 418]; *Saia v. New York*, [334 U.S. 558]; *Niemotko v. State of Maryland*, [340 U.S. 290]; *Kunz v. New York*, [340 U.S. 290]. . . . It is clearly unconstitutional to enable a public official to determine which expressions of view will be permitted and which will not or to engage in invidious discrimination among persons or groups either by use of a statute providing a system of broad discretionary licensing power or, as in this case, the equivalent of such a system by selective enforcement of an extremely broad prohibitory statute. [379 U.S. at 557-58.]

[Continued]

species of endeavor distinct from the ordinary daily activities in which human beings routinely engage at the Airport as elsewhere. Rather, "First Amendment activities" include all manner of activities that occur daily at the nation's airports.

For example, two relatives who meet each other after a long separation exercise First Amendment rights when they engage in discussion, whether that discussion concerns neighborhood gossip or weighty political or religious issues. Similarly, two strangers who happen to sit next to each other in an airport waiting area and choose to pass their time discussing the latest fashions, the day's newspaper headlines, the upcoming election, or the Pope's latest pronouncements are engaged in "First Amendment activities." The same is true of a student who brings with her to the airport and reads in an airport lounge

---

[2] [Continued]

See, reaffirming this doctrine and distinguishing it from First Amendment overbreadth, *City Council v. Taxpayers for Vincent*, 466 U.S. 789, 796-799 & ns.14 & 15 (1984).

There is another reason, aside from the specter of selective enforcement, for invalidating prohibitions on First Amendment activity where there is no clearly articulated policy to guide enforcement. Where that is the case, it is impossible for courts reviewing the prohibition upon communication to understand the state interests that, in the view of the pertinent officials, justify whatever restriction on expression is involved. *See Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 80-84 (1981) (Stevens, J., concurring) (where "the character of the prohibition [a municipality] seeks to enforce" is "hard to ascertain . . . [because] the record indicates that what actually happens . . . bears little resemblence to what is described in the text of the . . . ordinance," judicial review is impeded because "we are left to speculate as to the [locality's] reason for proceeding against [any individual] and as to the justification for the distinction the [locality] has drawn between [forms of expression]."); *see also* Kalven, *The Concept of the Public Forum: Cox v. Louisiana*, 1965 S. Ct. Rev. 113, 137; Farber & Nowak, *The Misleading Nature of Public Forum Analysis: Content and Context in First Amendment Adjudication*, 70 Va. L. Rev. 1219, 1243 (1984).

any literary work, for example, a novel by Charles Dickens, Karl Marx's *Das Kapital*, or the Holy Bible; nor does the student cease engaging in a "First Amendment activity" by showing a favorite passage to the person sitting next to her, or by offering to give the book to that person as a gift. A traveller who drafts part of a novel, business memorandum, or scientific report while between planes is also engaging in "First Amendment activity," as is a reporter who comes to the airport to interview an arriving celebrity. And any individual who purchases the Los Angeles Times or the latest best-seller as he or she leaves LAX is engaged in "First Amendment activity" as well. As far as we can tell, none of these activities have been banned at the Airport, nor do the Airport Commissioners claim the authority to ban such activity.

Rather, petitioners devote their brief to the defense of a somewhat narrower proposition, based on what is termed a "summary" of the Airport's policy. That "summary"—which appears in petitioners' brief in quotations marks (Pet. Br. at 3), but which nowhere appears in the record of this case—indicates that the ban on respondents' speech and publication distributing activity is in pursuit of a policy limiting activities at the Airport to "airport-related uses." Pet. Br. at 3.

Petitioners' "summary" of the Airport's policy is simply inconsistent with the agreed-on factual stipulations upon which this case must be decided. For those stipulations make it clear that while the Airport does not affirmatively foster, by setting aside special space or facilities, activities not regarded as useful to the travelling public (*see, e.g.*, Jt. App. 11a),[3] no general attempt is

---

[3] Even this proposition is somewhat problematic, given the record in this case. For example, while the Airport defends its leasing of space for a reading room to the Christian Science church as providing a quiet waiting space for the public (Pet. Br. 26), that explanation ignores the fact that "religious literature pertaining to the Christian Science faith" is on display in the room. Jt. App. 21a. Similarly, the attempt to justify a display on endangered

made either to restrict entry to the LAX terminals to those with airport-related purposes or to restrict those individuals present in the terminal to activity, expressive or otherwise, related to the Airport or to air travel. Jt. App. 8a, 13a; *see also* Pet. App. 14a (district court noting that "[t]he City . . . stipulated to other uses of LAX for non-travel related matters.") Conversely, while petitioners' "summary" of the Airport policy suggests that respondents would have been allowed to distribute their literature had the literature discussed the airport, or air travel, or, perhaps, if respondents distributed literature while waiting to board an airplane, there is nothing in the record to suggest that such activity would have been allowed, and the plain tenor of petitioners' overall argument is that such activity would not have been allowed.

Thus, it is simply not true that the Airport has pursued a neutral policy of limiting the use of a public facility by members of the public to a narrowly defined primary intended use. Rather, it appears that a more accurate statement of the Airport Commissioner's policy would be as follows:

The Airport reserves the right to ban pure, peaceful nonobstructive speech activity, including religious proselytizing and the sharing of written religious documents,[4] *whenever Airport management perceives that the speaker's primary purpose in being at the Airport is to engage in First Amendment expression and that the speech is not incidental to some other activity.* The question in this case therefore comes down to whether the Airport Commissioner may maintain such a policy.

---

species as a warning that importation of certain goods is illegal (Pet. Br. 20), is belied by the fact that, as far as appears in the record, the display contained no such warning.

[4] There is no issue in this case regarding airport regulation of *fund solicitation*, since it is undisputed that such solicitation is against the policy of respondent Jews for Jesus, and that none occurred during the incident underlying this lawsuit. Jt. App. 18a.

I. Petitioners' main defense of the Airport's policy is a simplistic one: because the Airport does not have as its "principle purpose the free exchange of ideas," the Airport "is not a traditional public forum. . .," and has broad latitude to ban expressive activity. Pet. Br. at 8. As we demonstrate in Part I, *infra*, this Court's cases do not sanction any such far reaching authority to prohibit First Amendment activity. Airport terminals, as we show, share the functional and structural characteristics that have led this Court to conclude that while expressive activities can be regulated on streets and in parks so as to assure that the principal purposes of such locations—transportation in the case of streets, and recreation in the case of parks—are not unduly impeded, such activities cannot be banned entirely in those areas, even if some limited measure of interference with the area's ordinary use necessarily occurs. The same First Amendment rule applies in this case.

II. Petitioners also contend that certain of this Court's recent First Amendment cases stand for the proposition that if airport terminals are *not* analogous for First Amendment purposes to streets and parks, then the Airport's right as owner of the property to exclude communicative activity is subject to no meaningful First Amendment restriction other than a prohibition on direct viewpoint distinctions. As we demonstrate in Part II, *infra*, the tripartite public forum typology of cases such as *Perry Education Association v. Perry Local Educators Assn.*, 460 U.S. 37 (1983) and *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*, 473 U.S. ——, 53 U.S.L.W. 5116 (1985), upon which petitioners rely for treating the Airport like private property, is of little aid in establishing the appropriate First Amendment balance in a case of this kind.

Perry, *Cornelius* and like cases grew out of situations which shared the following characteristics: (1) the government was itself involved in communication-fostering

activity; (2) the governmental property in question was devoted to internal governmental operations, or some other use analogous to private commercial activity; and (3) the issue in the case involved the claim of a right to physical access to a particular facility, rather than the claim of a right to engage in expressive activity by individuals whose physical access to a physical location was unquestioned.

Where those factors predominate, there are compelling reasons for striking the First Amendment balance in favor of a fairly wide deference to governmental decisions about the appropriate use of the governmentally-assisted mode of communication. Where, on the other hand, the government's principal use of a physical location has nothing to do with expression, the location is "public" in the sense that direct use by the citizenry generally (or some subgroup thereof) is affirmatively encouraged, or in the sense that unrestricted physical access is permitted, absolute governmental restrictions upon expressive activity entail dangers to First Amendment values similar to those posed by direct censorship of expressive activity. Under those circumstances, the government's actions must at least meet the test enunciated in *United States v. O'Brien*, 391 U.S. 367 (1968): any restriction on expression must serve important governmental interests unrelated to the suppression of expression and the restriction must be no greater than is essential to further the governmental interest. *See Taxpayers for Vincent, supra*, 466 U.S. at 803-05. The Airport's policy in this case is clearly invalid under that standard.

I. THE PUBLIC AREAS OF THE LAX TERMINAL CONSTITUTE A QUINTESSENTIAL PUBLIC FORUM.

The Airport Commissioners have attempted to prohibit certain First Amendment protected expression in the public areas of LAX's terminal facilities. This prohibition

is impermissible under the First Amendment because the Airport terminal constitutes a "public forum," which, absent a compelling state interest, can be regulated only by means of narrowly tailored, content neutral, reasonable "time, place and manner" restrictions. *United States v. Grace*, 461 U.S. 171, 177 (1983). Because petitioners have failed to advance a compelling government interest (or, indeed, even a permissible interest) justifying the prohibition, and because the prohibition is neither narrowly tailored, content neutral, nor a reasonable regulation of time, place or manner, but is instead a total ban on certain otherwise protected expression, the prohibition violates the First Amendment guarantee of free expression. *See Id.* at 181, 183 (total ban on protected expression in public forum cannot be justified as a reasonable regulation of time, place or manner and, as such, is unconstitutional).

A. A Quintessential Public Forum Is Defined By The Use of the Location for Expressive Activities, Not By Its "Principal Purposes" or By The Government's "Dedication" of The Location to Expression.

A. In *Hague v. CIO*, 307 U.S. 496 (1939), Justice Roberts rejected the notion, *see, e.g., Davis v. Massachusetts*, 167 U.S. 43 (1897), that the government may regulate expression on certain types of public property to the same extent as may an owner of private property. Instead, the government holds at least some public property under a First Amendment "servitude":

> Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.

[307 U.S. at 545 (opinion of Justice Roberts). *See* Kalven, *supra*, 1965 S.Ct. Rev. at 127.]

Since *Hague*, this concept of a First Amendment limitation on the government's power, acting in its proprietary capacity, to *entirely* close certain areas to expressive activity has been refined in developing the "public forum" doctrine. *See, e.g.*, Kalven, *supra*. Despite the differing formulations used to state the doctrine, *compare Grace, supra*, 461 U.S. at 178 *with Grayned v. City of Rockford*, 408 U.S. 102, 117-18 (1972), the Court has been unyielding in its protection of speech within the "quintessential" (sometimes referred to as the "traditional") public forum. *See, e.g., Grace*, 461 U.S. at 179-80, 183-84. As a result, the quintessential public forum doctrine serves as a *guarantee* that—in order to provide some minimal opportunity for citizens to discuss with each other face-to-face matters of mutual concern—communication among citizens is a use that must be accommodated in some public locations in some fashion, along with those locations other uses. That accommodation entails some limited measure of inconvenience or annoyance to those using the location for non-speech purposes while preserving the basic use of the area for its other intended purposes. *See, e.g., Cox v. New Hampshire*, 312 U.S. 569, 576 (1941). *Amalgamated Food Employees v. Logan Valley Plaza*, 391 U.S. 308, 315 (1968); *Perry Education Association, supra*, 460 U.S. at 45.

B. This Court has frequently referred to the above-quoted language from Justice Roberts' opinion in *Hague* in its public forum discussions. *See, e.g., Kunz v. New York*, 340 U.S. 290, 293 (1951); *Perry Education Association*, 460 U.S. at 45. Thus, in determining whether a particular piece of public property constitutes a quintessential public forum, it is useful to begin by re-examining *Hague*.

That re-examination demonstrates that, contrary to petitioners' submission, the public forum concept, even at its inception, in no way turned upon whether a particular location has the "principal *purpose* of the free exchange of ideas" or whether "[t]here is [intentional] *dedication* to communicative purposes." Pet. Br. at 8 (emphasis added). *Hague* does not imply that a quintessential public forum must be devoted primarily to expression, or that the governing entity must desire or intend the area to be one in which communication is encouraged or allowed.[5] Rather, *Hague* makes clear that the relevant factors are first, that the area is one generally open to broad *use* by members of the public and second, that this public use *often involves* expressive activity: "[T]hey [such areas] have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." 307 U.S. at 515.

Clearly, this is as it must be. The principal purpose of streets (and airports) is transportation (*Schneider v. New Jersey*, 308 U.S. 147, 160 (1939); *Valentine v. Christiansen*, 316 U.S. 52, 54-55 (1942)); that of parks is recreation (*Hague*, 307 U.S. at 505)). *See also, e.g., Schneider*, 308 U.S. at 160 ("Municipal authorities, as trustees for the public, have the duty to keep their communities streets open and available for movement of people and property, the primary purpose to which streets are dedicated"); *Cox v. Louisiana*, 379 U.S. 536, 554 (1965) ("Governmental authorities have the duty and responsibility to keep their streets open and available for movement"); *Niemotko v. Maryland*, 340 U.S. 268, 276 (1951) (Frankfuter, J., concurring) (the issue in cases concerning the dissemination of ideas in public

---

[5] This factor, however, may be relevant to the determination whether the property constitutes a "designated" or "limited" public forum. *See Perry Education Association*, 460 U.S. at 45-46 & n.7.

places is "how to reconcile the interest in allowing free expression of ideas in public places with the protection of the public peace and of the primary uses of streets and parks"); *id.* at 279 ("control of speech in streets and parks draws on . . . considerations [of] protection of the . . . primary uses of travel and recreation for which streets and parks exist.") Thus, neither streets nor parks are maintained for the principal purpose of providing a place for expression.

Similarly, neither streets nor parks are "dedicated" by the government to expression. Rather, it is because governments have repeatedly *refused* to "dedicate" those areas to expression, and instead have asserted the right to ban expression freely, that this Court has been faced with a myriad of cases concerning prohibition of speech on public streets and parks. *See, e.g., Grace* (ordinance prohibiting picketing on public sidewalk in front of Supreme Court building); *Grayned* (ordinance forbidding demonstration on public sidewalk adjacent to public school grounds); *Carroll v. President and Commissioners of Princess Anne*, 393 U.S. 175 (1968) (prohibition of rally near courthouse steps); *Cox v. Louisiana* (prosecution for demonstration on public sidewalk in vicinity of courthouse); *Martin v. City of Struthers*, 319 U.S. 141 (1943) (ordinance regulating door-to-door leafletting); *Jamison v. Texas*, 318 U.S. 413, 415 (1943) (ordinance based upon city's view "that it has the absolute power to prohibit the use of the streets for the communication of ideas); *Schneider* (same); *Hague* (ordinance denying right to hold public meetings in public streets and parks); *Davis v. Massachusetts* (ordinance forbidding public speaking in public park).[6]

---

[6] This is not to say, of course, that the primary functions of parks and streets are irrelevant to the constitutional inquiry. Rather, from the nascency of the public forum doctrine it has been recognized that the primary purposes of streets and parks are such that the expressive uses to which these public forums may be put

In short, to ascribe the protection of expressive activity on streets and in parks to the intent or the purpose of the governing authorities is simply to rewrite history, and to ignore the fifty years of First Amendment litigation necessary to establish and secure that protection.

C. The question then becomes what *are* the attributes of a publically-owned location that make the quintessential public forum doctrine applicable. *Hague* has on occasion been read as suggesting a strictly historical approach to this question. And it is true, of course, that, unlike streets, airport terminals, a twentieth century creation, have not been used since "time out of mind," for expressive purposes.[7]

---

are accommodated rather simply through reasonable time, place and manner regulation:

> The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied. [*Hague*, 307 U.S. at 515-16 (opinion of Justice Roberts).]

The point is that the non-expressive nature of the principal uses of the public property does not foreclose or determine the public forum inquiry; rather, these ordinary activities are taken into account in the consideration of what regulations of time, place and manner will be considered reasonable. *See also Schneider*, 308 U.S. at 160-61; *Grayned*, 408 U.S. at 115-17; *Heffron v. International Society for Krishna Consciousness*, 452 U.S. 640, 647-48 & n.10 (1981).

[7] To the extent that the history of the use of government property for expressive purposes is relevant, this Court has indicated that recent use is significant. *See Taxpayers for Vincent*, 466 U.S. at 815, n.32 (referring to the public forum as government property "clearly held in trust, either by tradition *or recent convention*, for the use of citizens at large") (emphasis added). It is clear from the decisions concerning terminal facilities, *see infra* pp. 14-18, that there is a "recent convention" of the use of such facilities for expressive purposes. Moreover, the stipulated facts in the

But the language of "tradition" in *Hague* and its progeny cannot be read literalistically. Rather, the fact that streets and parks have on occasion been used for expressive purposes throughout their history is simply confirmation of the facts that first, those locations are peculiarly suitable for such activity, and second, that any interference worked by peaceful expression with the area's transportation and recreational purposes are such as can be reasonably accommodated without significantly sacrificing those purposes. For example, the rule in *Hague* would certainly be applicable to a particular street which had no "tradition" of use for expressive purposes. In effect, the tradition of expression on public streets in general would substitute for the lack of such a tradition with regard to a street which had never seen a parade, protest or picket. This is because streets are so similar, one to the other, in *structure and function* that the elements which make speech appropriate to, and compatible with, one are common to all.

It follows that, in determining whether *other* public facilities are quintessential public forums, the governing factor must be whether there are structural and functional identities between the location in question, on the one hand, and streets or parks, on the other.

B. Airport Terminal Facilities Are Quintessential Public Forums.

"[A]n unsual consensus of judicial, legislative and administrative opinion would classify the public areas of [airport terminals] squarely within the public forum family." *United States Southwest Africa/Namibia Trade & Cultural Council v. United States*, 708 F.2d 760, 766 (D.C. Cir. 1983) (hereinafter cited as "*Southwest Africa*"). *See also Fernandes v. Limmer*, 663 F.2d 619

---

present case reveal an extensive recent history of use of the LAX terminal for a wide variety of expressive activities. *See* Jt. App. 11a-15a, 20a-21a.

(5th Cir. 1981) *cert. dismissed*, 458 U.S. 1124 (1982); *Rosen v. Port of Portland*, 641 F.2d 1243, 1245-46 (9th Cir. 1981); *Chicago Area Military Project v. City of Chicago*, 508 F.2d 921 (7th Cir. 1975) (hereinafter cited as "*CAMP*"); *Wolin v. Port of New York Authority*, 392 F.2d 83 (2d Cir. 1968). *See also International Society for Krishna Consciousness, Inc. v. Eaves*, 601 F.2d 809 (5th Cir. 1979); *Kuszynski v. City of Oakland*, 479 F.2d 1130, 1131 (9th Cir. 1973). These decisions are the result of detailed structural/functional analyses comparing airports and airport-like facilities to public streets.

First, like a street, an airport's principle purpose is to facilitate travel from one place to another. Further, an airport terminal is functionally similar to a street in that it contains "many of the facilities and services of a fair-sized municipality" (*Southwest Africa*, 708 F.2d at 764), including facilities "where air travelers as well as the general public may shop, dine, imbibe, and sightsee" (*Fernandes*, 663 F.2d at 627). In the present case, the Airport terminal contains cocktail lounges, restaurants, newsstands, gift shops, barber shops, informational displays, art displays and banking facilities. Jt. App. 7a-8a. Indeed, in both the terminal facility at LAX and in the terminal facilities under consideration in the above cited cases, the general public is not invited into the terminal merely for travel-related purposes, but also to utilize the aforementioned facilities. *See* Jt. App. 13a; *CAMP*, 508 F.2d at 925. *See also Fernandes*, 663 F.2d at 627 ("The analogy between these terminal concourses and public streets is further strengthened by the lack of restrictions on public access to the commercial establishments located along the . . . passageways . . . .").

Second, airport terminals and streets are structurally similar. As the Second Circuit noted, with respect to the Port Authority Bus Terminal, in words equally relevant here:

> [Passengers] are in the Terminal for the principal purpose of moving to and from other means of purpose of moving to and from other means of transportation—and the space is designed for precisely the purpose of transit. With the scope of operations so vast, the enclosure is desirable and indeed necessary if the congestion and confusion that would attend if all waited for buses on the street are to be avoided. In other times or better climes travelers have waited by the roadside or under some shelter for the oncoming vehicle. But here, the buses drive into the building and the passengers meet them there. The terminal, with its many adjuncts, becomes something of a small city—but built indoors, with its "streets" in effect set atop one another, and vehicles operating under, above, and to the side, not unlike some futuristic design for urban living. [*Wolin*, 392 F.2d at 89.]

Certainly the mere presence of a roof cannot make a decisive difference in First Amendment jurisprudence. Covered public streets have existed in many cities for hundreds of years, and exist now in this country in cities such as Minneapolis and Spokane, where weather conditions render such devices necessary. Meteorology has not heretofor been thought to be the science that defines the scope of the First Amendment.[8]

---

[8] The Federal Aviation Administration (FAA) has also noted the structural and functional similarities between airport terminals and streets, and has drawn a legal conclusion with respect to First Amendment rights similar to that drawn by Courts of Appeals. In the context of an administrative proceeding, mandated by 49 U.S.C. § 1359 (West Supp. 1986), to promulgate regulations governing expressive activity at Washington National and Dulles airports, the FAA observed,

> There is a considerable amount of social and commercial interchange in the terminals and, in many respects, the terminals are like any other public thoroughfare where there is no question that the Constitutional guarantees of freedom of speech, the exercise of religion and the right to peaceable assembly apply. These activities enjoy the protection of the First Amendment, and they may not be regulated by airport au-

Third, an airport terminal shares the characteristics that make expressive activity appropriate to, and compatible with, the other activities that take place on a street. Unlike an office building or a courthouse, for example, a terminal's normal uses are not those that require privacy or solitude; its inhabitants are not engaged in pacific or reflective activities. *Wolin*, 392 F.2d at 89; *see also CAMP*, 508 F.2d at 925. Rather, like a street or a covered marketplace, a terminal "is attended with noisy crowds and vehicles, some unrest and less than perfect order." *Wolin*, 392 F.2d at 90. Indeed, all manner of expressive activities routinely take place in terminals, as on streets, as an inherent part of their operation. *See supra*, pp. 2-5, 15-16. Thus, there is no realistic need to suppress expressive activities on a street or in an airport terminal in order to assure the smooth, uninterrupted operation of the facility.[9]

Finally, an airport terminal is often particularly well adapted to the intended communication. In *Wolin*, the plaintiff was attempting to communicate an antiwar message to the general public, and to soldiers particularly, who passed through the terminal in great numbers. 392 F.2d at 90-91. In the context of the present case, it should be noted that airport facilities are especially well suited to expressive activity by speakers without the resources to gain access to the most important and influential means of communication, the mass media. This is be-

---

thorities in the same manner as commercial activity. [Solicitation and Leafletting Procedures at National and Dulles International Airports, 45 Fed. Reg. 35,314 (1980).]

The regulation, as enacted, allows access for expressive activities. *See* 14 C.F.R. §§ 159.91-.94 (1982).

[9] Even if this were not the case, it would make no difference in the context of the present action. Here, the stipulated facts reveal that the conduct of the respondents presented no interference with the operation of the terminal. *See* Jt. App. 18a, 19a. *See also CAMP*, 508 F.2d at 925 (no contention that "the activities of the plaintiffs do in fact obstruct airport traffic").

cause airports allow such speakers to spread their message inexpensively to a unique audience not found on city streets: travelers, who in turn, take that message to all corners of the nation (and, indeed, the world). Moreover, because many users of airline terminals are waiting for planes rather than rushing along, they are more likely to be willing to listen to the views of fellow citizens than pedestrians on city streets. Thus, the small-scale speaker can achieve a much greater dispersion of, and attention to, his message at an airport than would otherwise be possible.[10]

Taking into account the above factors, "it seems clear that the public places in these airports are far more akin to such public forums as streets and common areas than they are to such nonforums as prisons, buses, and military bases." *Southwest Africa*, 708 F.2d at 764. It follows, we submit, that the Airport terminal in the present case constitutes a quintessential public forum and, thus, that the petitioners' total ban on protected expression is unconstitutional.[11]

---

[10] These unique characteristics are particularly applicable to LAX, which is the "largest destinational airport in the world with the largest number of enplaning and deplaning passengers." Jt. App. 9a. Moreover, the sidewalks outside the LAX terminals do not provide adequate access to this unique audience; "at least 25 percent of the passengers [at LAX] do not use the sidewalk area." Jt. App. 9a.

[11] *Heffron, supra*, is not to the contrary. The question there was not whether the forum in question (a state fairground) was a public forum, but whether the challenged restriction—which, unlike the regulation in this case, applied neutrally to both expressive and nonexpressive activity—constituted a reasonable time, place and manner regulation of the forum. *See Heffron*, 452 U.S. at 647-48 (citing *Grayned, inter alia*). For the Court in *Heffron* stressed that the fairground was *not* entirely closed to proselityzing activity; the regulation in question left free reign for person-to-person oral communication. Thus, the type of restriction challenged in *Heffron*, a regulation of the places at which certain expressive activity could take place within the grounds, was much narrower than the total

II. EVEN IF THE LAX TERMINAL IS NOT A QUINTESSENTIAL PUBLIC FORUM, THE TOTAL BAN UPON CERTAIN PEACEFUL, NONOBSTRUCTIVE COMMUNICATIVE ACTIVITY IS INVALID BECAUSE SUCH A BAN DOES NOT SERVE IMPORTANT GOVERNMENTAL INTERESTS UNRELATED TO THE SUPPRESSION OF EXPRESSION IN A MANNER THAT WORKS NO GREATER RESTRICTION ON EXPRESSION THAN IS ESSENTIAL TO FURTHER THE GOVERNMENTAL INTEREST.

Petitioners maintain that if the Airport is not a quintessential public forum, then expressive activity of any kind can, consistent with the First Amendment, be banned at the Airport subject only to the limitations that the prohibition be reasonable and not be an attempt to sup-

---

prohibition of "First Amendment activity" anywhere within the public forum here at issue. If, similar to the authorities in *Heffron*, petitioners were attempting to restrict expressive activity to "booths" within the airport terminal, an entirely different case would be presented.

Heffron does, to be sure, indicate that in gauging the validity of truly neutral time, place and manner restrictions, the precise nature of the location is relevant. The reason is that such restrictions are primarily designed to assure that communicative activity does not seriously disturb an area's ordinary uses. In making that determination, the precise nature of a given area is obviously relevant. *See* 452 U.S. at 650-51.

Thus, for example, we would expect that in airports, the manner of expressive activity could be regulated considerably more extensively than on streets. In particular, activities such as parades, large demonstrations or mass meetings might never be appropriate at airports, even though, as *Hague*, and *Cox v. New Hampshire*, indicate, municipalities must provide some access to streets and parks for such purposes. The reason is that, unlike streets, airports usually provide only one way to reach any given destination, so that temporary obstructions cannot be avoided by taking another route; in addition, because airplanes run on schedules, even minimal delays in reaching one's airport destination may lead to much more serious delays in overall travel than such a delay on the streets.

press a particular viewpoint.[12] In support of that proposition, petitioners rely on several recent cases, including *Perry Education Association*, *supra*, and *Cornelius*, *supra*, which, they claim, establish that except in the few locations that constitute quintessential public forums, the government is free to prohibit communicative activity without regard to the constitutional standards that ordinarily protect expressive activity.

Our understanding of the nonpublic forum cases such as *Perry* and *Cornelius* is quite different. Those cases simply outline "a means of determining when the Government's interest in limiting the use of its property to its intended purposes outweighs the interest of those wishing to use the property for other purposes."

---

[12] It is doubtful that petitioners' policy meets even their posited extremely deferential standard. The *only* justification petitioners offer for their policy of selectively prohibiting communicative activity is that an airport is entitled to restrict the use of its facilities to airport-related purposes. This justification is belied by the express stipulation that petitioners have not otherwise attempted to limit use of the Airport by the public to those individuals with an airport-related reason to enter. Rather, as we noted at the outset (*supra*, pp. 5-6), petitioners' policy is to permit individuals with non-airport related purposes to enter the premise for any compatible use *except where* the individual's primary purpose is to engage in communicative activity. For that rather odd policy petitioners have offered no rational explanation whatever.

The Airport's bare assertion that its "functions would be seriously disrupted by the activities of all the groups who wish to use the terminal facilities to expound their views on a myriad of subjects" (Pet. Br. at 26-27) certainly does not provide the requisite justification. This assertion, in the first place, lacks any support in the record. In addition, the claim is contradicted by the fact many of the nation's airports, including those in the District of Columbia, operate, apparently without "serious[] disrupt[ion]", and without petitioners' total prohibition policy. *See supra*, pp. 14-18, and cases and regulations cited therein. Most importantly, petitioners offer no explanation as to why use of the airport by those by those "who wish to use the terminal facilities to expound their views on a myriad of subjects" would "seriously disrupt" the Airport's functions (Pet. Br. at 26-26) while the presence of other individuals pursuing other non-airport related purposes would not.

Cornelius, 53 U.S.L.W. at 5119. In effect, the nonpublic forum doctrine provides a formula for stating in a shorthand fashion, the result of balancing First Amendment interests against nonspeech governmental interests in a certain class of situations.

At the same time, in other recent cases—most importantly, *Taxpayers for Vincent*, *supra*—the accommodation between First Amendment interests and the governmental interest in control of public property has been articulated through generally applicable First Amendment standards, treating the governmental interest in control of the citizens' property as an interest no different from any other neutral governmental interest asserted to countervail the interest in free speech. Thus, *Taxpayers for Vincent* applied the standard derived from *United States v. O'Brien*, 391 U.S. 367 (1968); *viz.*, whether the regulation in question furthers an important or substantial governmental interest, unrelated to the suppression of free expression, and does so in a manner that works no greater restriction on speech than is essential to further that interest. *See* 466 U.S. at 803-05.[13]

The threshold question, then, is whether this is the type of case in which the shorthand statement of the law summarized in the nonpublic forum doctrine governs or whether, instead, the circumstances here are sufficiently dissimilar from those in which the nonpublic forum standards were developed to require, in the manner of *Taxpayers for Vincent*, a more detailed consideration of the precise nature of the competing interests at stake. In deciding that question, it is useful to bear several points in mind.

First, the oft-repeated edict that the government " 'no less than a private owner of property has power to

---

[13] The Court in *Taxpayers for Vincent* was unanimous in holding that this was the applicable standard, although three members of the Court disagreed with the application of the standard to the particular circumstances. *See* 466 U.S. at 824.

preserve the property under its control for the use for which it is lawfully dedicated' " (*Cornelius*, 53 U.S.L.W. at 5119), does not signal that bare control of private property, as such, is a governmental interest entitled to protection. In contrast to private property ownership, public ownership has no constitutional dimension. *Cf.*, *Hague*, rejecting the rule of *Davis v. Massachusetts*. Rather, the government owns property and controls it in pursuit of various discrete governmental purposes, ultimately on behalf of the citizenry at large. Since those purposes vary widely, the nature and strength of the governmental interest in control of its property has no unitary quality, but, instead, varies widely.

Second, it is nonetheless true that "[*a*]*t some point*, the government's relationship to things under its dominion and control is virtually identical to a private owner's property interest in the same kinds of things." *Taxpayers for Vincent*, 466 U.S. at 814, n.31 (emphasis supplied). That point is approached, for example, where the particular property use does not involve providing direct governmental service to the public at large but, instead, involves internal governmental operations. Thus, to cite the example given by *Taxpayers for Vincent*, city-owned automobiles may be essential to permit the government to function, but, unlike buses, streets or airport terminals, the public at large has no right to make direct use of those automobiles for any purpose, expressive or otherwise. As to such property, there is a strong interest in assuring that the government realizes the efficiencies of unrestricted control, parallel to that permitted private enterprises engaged in parallel operational and administrative tasks.

Third, as the foregoing suggests, there is a major difference, albeit not necessarily a controlling one, between locations as to which physical access is permitted as a matter of course to the general public, including its members who are claiming the right to engage in expressive activity, and areas or modes of communication

as to which physical access is itself the claimed First Amendment right. In the first of these contexts even a private party's property interests are deemed to be so worn down by usage that it is constitutional to require the owner to permit communicative activity by individuals otherwise validly present. *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980). *Compare Republic Aviation v. Labor Board*, 324 U.S. 793 (1945) *with NLRB v. Babcock & Wilcox*, 351 U.S. 105 (1956); *and Hudgens v. NLRB*, 424 U.S. 507, 521 n.10 (1976) (the distinction between an employer's interest in restricting physical access to its property by strangers to the enterprise and the interest in limiting the communicative activity of those otherwise validly present is "one of substance"). Where physical access is open there is, of course, no governmental interest in controlling the number of individuals on the premises. And a government permission to use government facilities only on the condition that the members of the public refrain from certain peaceful, nonobstructive communicative activities smacks of the censorship at which the First Amendment is most assuredly aimed.

Finally, there are differences of substance between situations in which the government acts to affirmatively facilitate communication or expression between certain designated classes of speakers and listeners, and those in which the location to which the regulation applies is exactly that—a physical area—and not a "forum" at all in the sense of a means of exchanging ideas. In the former, the government is acting to forward First Amendment interests, by providing citizens, albeit only a subgroup thereof, with a means of reaching each other not otherwise available. An individual seeking access to such a government-controlled specialized speech forum is in reality requesting that the government provide him with assistance in reaching an audience. Moreover, in that situation, the government necessarily has some legitimate interest in such aspects of the communicative activity as

its content and the identity of speakers, for those factors define the basic parameters of the role the government has voluntarily undertaken. In contrast, where the government is not directly assisting speech but is simply in charge of a physical location conducive to speech, an individual who is otherwise allowed on the premises is, in asserting First Amendment rights, asking only that the government *not interfere with his speech*, and not that the government assist his speech. This distinction is of particular weight where the government's communication-enhancing activity requires extensive direct contact between the individual seeking access and government officials.

The Court has applied the nonpublic forum approach where the considerations just canvassed indicate that the "government property interests essentially mirror[] analogous private interests." *Taxpayers For Vincent*, 466 U.S. at 815, n.32. In each instance, physical access to a specialized governmental mode of communication was being sought. *See Perry Education Association, supra*; *Cornelius, supra*; *United States Postal Service v. Greenburgh Civic Association*, 453 U.S. 114 (1981); *Lehman v. City Shaker Heights*, 418 U.S. 298 (1974).[14] In each instance the governmental mode of communication required that some distinctions be drawn among speakers, and, in most, required direct contact between the speakers and government officials. The question was therefore

---

[14] We do not understand *Greer v. Spock*, 424 U.S. 828 (1976) to come within the nonpublic forum class of cases. Rather, as this Court made clear in its treatment of *Greer* in *Brown v. Glines*, 444 U.S. 348, 354 (1980), the First Amendment analysis in *Greer* did not turn on the nature of the property in question but on a more general First Amendment balancing approach similar to that used in *Taxpayers for Vincent*. *See Brown v. Glines*, 444 U.S. at 355 (the regulations in *Greer* "protect a substantial government interest unrelated to the suppression of free expression"—*viz.*, protection of military discipline—and "restrict speech no more than is reasonably necessary to protect the substantial governmental interest.")

not whether the government should simply leave individuals otherwise validly present alone to engage in expressive activity, but whether the government was required to provide assistance to a broader range of speakers than the government had chosen to aid. Finally, the government's activities in each of these instances was in some sense managerial or enterpreneurial, activities with precise parallels in the private sector: *Perry* and *Cornelius* involved internal communications with government employees, while *Greenburgh Civic Association* and *Lehman* involved governmental "sales" of valuable opportunities to communicate.

In contrast, even if contrary to our contention in Part I, *supra*, the government property interest in an airport terminal is not deemed to fall within the "paradigm[] of [a] government property interest . . . clearly held in trust either by tradition or recent convention for the use of the citizens at large" (*Citizens For Vincent*, 466 U.S. at 815, n.32), it is still clear that the situation here is closer to that situation than to the one in which "government property interests essentially mirror[] private interests" (*id.*). The Airport terminal is freely accessible to all members of the general public; the Airport is not engaging in any communication enhancing activity; and the Airport is not conducting its internal business operations, common to any modern enterprise, at the location in question. Rather, the Airport is providing to the public at large a physical location with no private sector analog; the respondents are not seeking any affirmative aid from the Airport; and there is no situational imperative for making choices between communicators or communications. Thus, respondents claim is merely that they carry with them at the Airport as elsewhere the right to engage in communicative activity that does not interfere with any substantial, speech-neutral governmental interest that cannot be accommodated through sensible time, place and manner regulation.

Because this is therefore a case which, looked at most favorably to the Airport Commissioners, falls between the "paradigms of government property interests essentially mirroring analogous private interests and those clearly held in trust . . . for the use of the citizens at large" (*Taxpayers For Vincent*, 466 U.S. at 815, n.32), it is the kind of case in which nonpublic forum analysis does not provide "a workable analytical tool", and in which the more detailed and painstaking approach to the First Amendment balancing problem employed in *Taxpayers For Vincent* itself is appropriate.[15] Under that approach, it is clear that the Airport's policy cannot stand.

The Airport Commissioners have failed to assert any substantial governmental interest separate from a bare desire to control the use of the terminal property. And, in any event, there would clearly be ways other than a total ban to control, through valid time, place, and manner restrictions, any likely adverse impact due to communicative activity at the Airport, including any impact due to the number of people seeking to engage in such activity. See *supra*, pp. 2-5, 14-18 & 20, n.12. Because the Airport Commissioners therefore have no viewpoint-neutral reason sufficiently strong to override respondents' interest in free expression, the Airport's policy of prohibiting certain kinds of peaceful, nonobstructive expression in the Airport terminal must fail.

---

[15] *Taxpayers for Vincent* did discuss briefly the pertinence of public forum analysis to that case. 466 U.S. at 814. However, it is clear that the Court viewed the public forum approach as raising a separate issue of whether the nature of the property provided the speakers with *greater* rights than would be available under more general First Amendment doctrine, and not as a substitute for the careful, individualized balancing required by *O'Brien*. *See* 466 U.S. at 814 (characterizing the public forum question as whether, given the nature of the property in question, the speakers "occupy a *special position* in terms of First Amendment protection.")

CONCLUSION

For the reasons stated above, the judgment below should be affirmed.

Respectfully submitted,

MARSHA S. BERZON
177 Post Street
San Francisco, CA 94108

LAURENCE GOLD
(Counsel of Record)
815 16th Street, N.W.
Washington, D.C. 20006
(202) 637-5390